United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-6106

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For the Second Circuit.

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

-against-

SAMUEL H. SLOAN, individually and d/b/a
SAMUEL H. SLOAN & CO.,

Defendants-Appellants.

Appellant's Brief

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

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SAMUEL H. SLOAN & CO.

Defendants-Appellants

75-7056

APPELLANT'S BRIEF

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the court below, Ward, J., err in granting the motion of the Securities and Exchange Commission to adjudge the defendant in contempt of court?

2. Did the court below err in denying the motion of Samuel H. Sloan to dismiss the complaint on the ground of mootness?

3. Did the court below, err in denying the motion of defendant for an order dismissing this action and adjudging the Securities & Exchange Commission, the individual commissioners and their counsel in contempt of court for wilfully disobeying the order of the court of December 30, 1974 and for issuing press releases in violation of the Canons of Legal Ethics of the American Bar Association?

4. Did the court below err in denying the motion of defendant to enjoin the Securities & Exchange Commission from harassment and annoyance of Samuel H. Sloan?

5. Did the court below err in striking certain interrogatories propounded by defendant?

6. Is the defendant Samuel H. Sloan entitled to a trial by jury?

7. Has the court below, Ward, J., displayed such bias and prejudice and such wilfull, deliberate and manifest disregard for the law as to require his recusal from all further proceedings in cases involving Samuel H. Sloan?

STATEMENT OF THE CASE

This is an appeal from various orders of the Hon. Robert J. Ward. There is already an appeal pending before this court from the same action in the district court. That appeal has been assigned the docket no. 75-7056. In that appeal, all briefs have been filed and the case in awaiting argument. Accordingly, this brief is concerned primarily with events which occurred after the order appealed from in that appeal.

This action was commenced on December 30, 1974. The defendant received notice of the commencement of the action by a telephone call from the New York Regional office of the S.E.C. The summons and complaint were never formally served. However, during the course of an application to Judge Ward by the Securities & Exchange Commission ("S.E.C.") for a temporary restraining order, a copy of the complaint was handed to the defendant by an S.E.C. attorney.

Judge Ward granted a temporary restraining order on December 30, 1974. However, Judge Ward directed the S.E.C. not to issue its custom-

ary press releases in connection with this lawsuit. The temporary restraining order was extended for another ten days on January 8, 1975 by Judge Griesa because Judge Ward was away on vacation. On January 17, 1975 Judge Ward conducted a hearing at which time the defendant, Samuel H. Sloan ("Sloan"), was permitted to testify on his own behalf although no witnesses were called by the S.E.C. At the conclusion of this hearing, Judge Ward granted the motion of the S.E.C. for an injunction. A final judgment was entered by the clerk of the court and the case was marked closed on the civil docket. The judgment of injunction and the prior temporary restraining orders form the basis for the first appeal.

In a notice of motion dated March 6, 1975, Sloan moved for an injunction enjoining the S.E.C. and all employees and agents thereof from harassment and annoyance of the defendant. (App. 1)[1].

On March 9, 1975 Sloan was struck by an automobile in upstate New York and suffered displaced fractures of the bones of both lower extremities. He was hospitalized in Plattsburgh, N. Y. for two weeks and then was transferred to Lynchburg, Virginia. There,Sloan was confined in the Lynchburg General Hospital and on April 3, 1975 he underwent a second operation involving the manipulation and recasting of his legs. Shortly thereafter Sloan was released from the hospital but he remained in Lynchburg and continued to be bedridden and/or wheelchair bound until late August, 1975.

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1. For the sake of conformity with the brief and appendix submitted in the prior appeal, all references to pages of the appendix in the current appeal will be designated by App.____ and all references to pages of the appendix of the prior appeal will be designated by A- ____.

Meanwhile, on April 1, 1975, via a notice of motion dated March 24, 1975, the S.E.C. moved the court to adjudge the defendant in contempt of court for "wilful violations of the order of injunction dated January 17, 1975 and to impose such remedial sanctions as this court may deem appropriate." (App. 20). The S.E.C. served the motion papers by mailing a copy of the same to the defendant at the Champlain Valley Physicians Hospital in Plattsburgh, N.Y. (App. 9). Among other things, the moving papers of the S.E.C. claimed that bid and ask quotations were appearing in the pink sheets along side Sloan's name and the telephone number of his hospital room in Plattsburgh, N.Y. (App. 27).

A pre-trial conference was scheduled by Judge Ward for April 11, 1975. Sloan was not notified of the scheduling of this pretrial conference and, because of his physical condition, would not have been able to attend in any event. The docket sheet indicates, however, that a pre-trial conference was held on that date.[2] (App. iii).

On April 28, 1975 the S.E.C. concluded an administrative proceeding against Sloan which had been pending since April 24, 1972. The order of the S.E.C. revoked the broker dealer registration of Samuel H. Sloan & Co. and barred Sloan from being associated with any broker or dealer. (App. 118). Sloan subsequently filed a petition for review in this court which is now pending under the docket no. 75-4087.[3]

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2. The S.E.C. remained silent on this point until December 1, 1975 when it filed a memorandum which asserted on page 5 thereof that the docket sheet was in error and that the pre-trial conference which had been scheduled for April 11, 1975 was not held.

3. On December 3, 1975 Sloan filed a motion with the S.E.C. for reconsideration of that decision and is awaiting a decision on that motion.

On May 6, 1975 the S.E.C. published in the S.E.C. News Digest its customary press release with respect to its decision in the administrative proceeding. The press release also discussed the pending lawsuit before Judge Ward. (App. 81). On May 7, 1975 the Wall Street Journal published an article based upon the press release issued by the S.E.C. the previous day. (A84). This newspaper article also made reference to the pending action before Judge Ward.

With a notice of motion dated June 11, 1975 Sloan, who was submitting his first papers in this case since his automobile accident three months earlier, moved for an order (1) vacating the injunction entered in this action on January 17, 1975 on the grounds that the injunction failed to comply with Rule 65 F.R. Civ. P. (2) dismissing the complaint on the grounds that the complaint failed to state a claim upon which relief can be granted, the plaintiff had wilfully disobeyed an order of this court and this action had become moot because of the order of the S.E.C. dated April 28, 1975 and (3) holding in contempt of court the S.E.C., commissioners Ray Garrett, Jr., Philip A. Loomis, Jr., John R. Evans, A. A. Sommer, Jr., Irving M. Pollack and attorneys George A. Fitzsimmons, William Nortman, Thomas L. Taylor, III and Paul Gonson, disqualifying them from appearing in this proceeding and barring them from the practice of law in this court on the grounds that the press release of May 6, 1975 violated the court order of December 30, 1974 and the Canons of Ethics of the American Bar Association. Also on June 11, 1975 Sloan submitted interrogatories addressed to the S.E.C. (App. 37).

On July 14, 1975, the S.E.C. moved for a stay of discovery pending the outcome of defendant's appeal or, in the alternative, for a protective order pursuant to Rule 26(c) F.R. Civ. P. directing that the

questions propounded in defendant's interrogatory need not be answered by plaintiff. (App. 51).

On July 22, 1975 all of the motions which had been accumulating since early March, 1975 except for the motion for a stay of discovery and for a protective order, were decided as follows:

The motion to enjoin harassment was denied without opinion. The memorandum decision merely said: "Motion denied. So ordered."

The motion of the S.E.C. for contempt of court was denied. The court stated:

> "Defendant Samuel H. Sloan ("Sloan") has wilfully violated the preliminary injunction entered on January 17, 1975 and served personally upon him on that date. Sloan has refused to permit inspection of his books and records by representatives of the Securities and Exchange Commission ("the Commission") as directed by the Court and has indicated that he will continue to do so.
>
> Accordingly, the Commission's motion to adjudge Sloan in contempt of this Court is granted and Sloan is adjudged in civil contempt. In view of his physical condition, the Court will not at this time order his imprisonment or impose a fine but will instead direct that Sloan's books and records be removed to a place where they may be inspected by representatives of the Commission as directed in the preliminary injunction.
>
> Settle order on notice. Signed: Robert J. Ward/U.S.D.J."

The motion to vacate the injunction and to hold the Commissioners in contempt of court was denied. The memorandum decision stated:

> "Motion disposed of as follows:
>
> That branch of the motion which seeks to vacate the preliminary injunction is denied for lack of jurisdiction since the validity of the injunction is presently before the Court of Appeals.
>
> That branch of the motion which seeks to hold plaintiff, its Commissioners and other employees in contempt of court is denied. The releases in question did not violate this Court's oral order of December 30, 1974. The order, granted in response to defendants' application for a restraint on the issuance of press releases "with regard to the commencement of this action" did not prohibit releases such as those issued here, describing "the end work product."

The remaining branches of defendants' motion, some of which have here before been denied, have all been reconsidered and, upon reconsideration, are in all respects denied.

So. ordered. Signed: Robert J. Ward, U.S.D.J."

The decision of Judge Ward did not pass on that branch of the motion which sought to vacate the injunction on the ground of mootness. However, Sloan had raised the identical argument in a motion he had filed concurrently in the prior injunctive action before Judge Ward, S.E.C. v Samuel H. Sloan & Co. 71 Civil 2695. Judge Ward denied that motion on July 22, 1975 as follows:

"In view of the revocable nature of the sanction imposed by the Securities and Exchange Commission (Hanly v Securities and Exchange Commission, 415 2d 589, 598 (2d Cir. 1969), and in view of what this Court considers the substantial probability that the violations to which the permanent injunction was addressed may be repeated, defendant's motion to vacate the permanent injunction and for other relief is in all respects denied.
It is so ordered. Signed: Robert J. Ward, U.S.D.J."

In a notice of motion dated July 28, 1975 Sloan moved (1) for re-argument (2) for a hearing and/or trial by jury on the motion for contempt and (3) for an order pursuant to 28 U.S.C. 144 and 28 U.S.C. 455 recusing the Hon. Robert J. Ward from proceeding further in this case on the grounds that he had demonstrated bias and prejudice against the pro se defendant and that, by virtue of his conduct in this case, he had demonstrated his lack of regard for the oath prescribed by 28 U.S.C. 453 and his unfitness to be a judge of the United States District Court (4) for leave to appeal pursuant to 28 U.S.C. §1292(b) and (5) for a stay pending appeal. (App. 120).

On August 4, 1975, Judge Ward decided the motion of the S.E.C. to stay discovery or, in the alternative, for a protective order. His memorandum decision said:

"Motion disposed of as follows:
That branch of the motion seeking to stay discovery pending the outcome of defendants' appeal of the preliminary injunction is

in the Court's discretion denied.

That branch of the motion seeking a protective order is granted as to Interrogatory Nos. 5, 8, 9, 10, 11, 12, 13, and 14. These Interrogatories do not appear to be relevant or reasonably calculated to lead to the discovery of admissible evidence. It is denied as to Interrogatories 1, 2, 3, 4, 6 and 7. Answers to these six Interrogatories shall be served and filed within 30 days of the date of this decision.

It is so ordered. Signed: Robert J. Ward, U.S.D.J."

On August 18, 1975, Judge Ward denied Sloan's motion of July 28, 1975 as follows:

"Defendant having failed to present facts or legal reasons sufficient to form a basis for the granting of any portion of his motion, the motion is in all respects denied.

It is so ordered."

On September 2, 1975 the S.E.C. submitted what it deemed to be "answers" to defendant's interrogatories. (App. 137).

On September 3, 1975 Judge Ward signed an "order of civil contempt" (App. 144) which had been submitted by the S.E.C. in accordance with the prior decision of Judge Ward which had directed the S.E.C. to "settle order on notice." Sloan filed by mail a notice of appeal from this and prior orders on September 12, 1975. (App. 149).

Although that concludes a statement of the record of this appeal, there have been events subsequent to September 3, 1975 which, although not directly involved in this appeal, will no doubt be of interest to this appellate court.

On September 5, 1975 Stuart Perlmutter, Chief Attorney, Br. #4 of the S.E.C. wrote a letter to Sloan which stated the following:

"Dear Mr. Sloan:

Enclosed please find a certified copy of an Order of Civil Contempt issued by Judge Ward on September 3, 1975 in the above matter. Please take notice that Judge Ward has granted you twenty (20) days from the date of said order to purge your contempt by

permitting immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Sloan & Co.

Please telephone Mr. Ralph Pernick of this office at 212-264-8552 in order to set up a convenient time and place for such examination."

On November 20, 1975 Sloan moved for an order granting immunity from arrest and from service of process in the Southern District of New York during such times as he may be within the State of New York for the sole purpose of attending at court to argue his appeals in the United States Court of Appeals for the Second Circuit. The grounds for this motion were (1) this court has no personal jurisdiction over Samuel H. Sloan, the summons and complaint having never been served and (2) Samuel H. Sloan is immune under these circumstances from arrest and from service of process in the State of New York. In his affidavit in support of this motion, Sloan stated, among other things, that after receiving the letter of September 5, 1975 he had called Ralph Pernick and had been informed by Mr. Pernick that the New York Regional office of the S.E.C. no longer had an interest in examining Sloan's records. In opposition to this motion, the S.E.C. submitted an unsworn memorandum of law dated December 1, 1975. This memorandum did not deny that the New York Regional office of the S.E.C. no longer had an interest in examining Sloan's records.

In a notice of motion dated December 2, 1975 Sloan moved for an order dismissing the action and adjudging the S.E.C. and attorneys William D. Moran and Ralph Pernick to be in contempt of court on the grounds that the S.E.C. had disobeyed the order of the court dated August 4, 1975 in that it had failed to file responsive answers to questions 1, 2, 3, 4, 6 and 7 as required by Judge Ward's order and by the Federal Rules of Civil Procedure.

As of this writing the S.E.C. has not filed opposition to this motion and neither this nor the prior motion of November 20, 1975 has been decided by Judge Ward.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN GRANTING THE MOTION BY THE S.E.C. FOR CONTEMPT AND THE CONTEMPT ORDER ITSELF IS ILLEGAL AND INVALID.

A

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK HAS NO JURISDICTION OVER SAMUEL H. SLOAN.

From the day of the commencement of this action, Sloan has argued that the court has no jurisdiction. Sloan has pointed out numerous jurisdictional defects including the lack of subject matter jurisdiction and the lack of personal jurisdiction.

From the beginnning of this lawsuit, Judge Ward has had reason to believe that this action would turn out to be a test of the limits and extent of judicial power. On the day the complaint was filed, Sloan came to Judge Ward's chambers to contest the application of the S.E.C. for a temporary restraining order. Sloan appeared with his suitcase in hand as he was on his way to the airport to catch a plane to Iceland. During the colloquy in chambers Judge Ward stated more than once that he was prepared to sign an order "stopping" all of Sloan's transactions. (A-77) (A-79) (A-86). Sloan questioned whether the court had the power to do this and the following colloquy took place. (A-87):

> Mr. Sloan: No, your Honor, except that I'm sort of wondering because you made a reference to the fact you would authorize the Commission to stop any transactions.
>
> Of course, transactions which I have already made on the telephone have been made.

I would submit there is no mechanism available to undo something which has been done already to begin with.

The Court: Something which has been completed; you may be right. Something which is in process, you may be wrong."

With respect to his imminent departure from the United States, the S.E.C. in effect asked the court to prohibit Sloan from "keeping his scheduled appointments in Iceland. (A-73). However, Judge Ward stated (A-86):

"I do not intend to order him -- I'm not sure that I could anyway, but I do not intend to order him not to proceed with his plans."

At that point Sloan was in Judge Ward's presence in chambers. There is no doubt that Judge Ward then had the physical mechenism available to prevent Sloan from making his scheduled 8:00 P.M. flight to Iceland. Nevertheless, Judge Ward questioned his own power to keep Sloan off the airplane thus raising an issue which continues to be of significance in the action now on appeal.

All federal courts are courts of limited jurisdiction. This occurs in part because the constitution provides that jurisdiction of every federal court shall be set forth by an Act of Congress. However, the jurisdiction of the federal courts are further limited by the principles of comity and federalism as well as by a self imposed "judicial restraint." Perhaps the most classic example of the importance judicial restraint is Marbury v Madison 5 U.S. [1 Cranch] 137 (1803) where the Supreme Court refused to exercise a power given to it by an Act of Congress and, in so doing, is generally thought to have vastly increased the power of the court.

Another case of importance is strengthening the jurisdiction of the federal courts was Martin v Hunter's Lessee 1 Wheat 304 (1816) which has been called "the keystone of the whole arch of Federal judicial power."

Prior to that decision, the Supreme Court had the statutory power to reverse a civil state court judgment but this power was little more than theoretical because in practice the state court could simply ignore the Supreme Court's decision and, in fact, this circumstance had occurred on several occasions. However, in Martin v Hunter's Lessee the Supreme Court established that in such cases it would enforce its orders simply by entering a judgment of its own which would have the effect of nullifying or reversing the civil judgment of the state court and would then direct that the prevailing party have execution therefore. Because of this decision the state courts had no choice but to go along with the decision of the Supreme Court.

From this it is apparent that the strength and the power of the federal courts is derived from the fact that, in the last analysis, the federal courts have the mechanism to enforce their orders. Indeed, there can be no doubt that every federal judge must be constantly aware of the extent and the limitations of his own power so as to be careful not to enter an order which he will be unable to enforce.

It is fairly rare for a case to arise where there is a serious question as to whether a judicial order is enforceable. One such case was United States v Nixon 418 U.S. 683 (1974). In that instance it seemed unquestionable that the law and the facts were on the side of the government but nevertheless there was fear that the Supreme Court would decide in favor of Nixon in recognition of the likelyhood that a contrary determination would demonstrate the futility of Supreme Court power. As it turned out, of course, the Supreme Court decided against Nixon and a little more than two weeks later he resigned from office in spite of a statement of one of his then few remaining defenders, Rep. Earl F. Landgrebe (R-Ind.), who declared, "I'm sticking by my President even if he and I have to be taken out of this building and

shot." (He was later defeated for re-election.) Although the resignation of President Nixon is considered to have been an act of humility and deference to the will of the people of this nation, there have been indications that at the time of his resignation he had already been effectively stripped of his most important powers because the Secretary of Defense and others were willing, if necessary, to disobey his orders. The simple fact is that it is unlikely that the 2, 893,119 federal employees would have been inclined to follow the commands of a President who was unwilling to defer to the authority of the United States Supreme Court.

This point establishes another important principle relevant to this appeal which is that the federal courts der their power at least in part from the wisdom of their decisions. If federal judges did not have the reputation for rendering scholarly and learned opinions and for being right most of the time, there can be no doubt that they would eventially be stripped of much of their power. The principle in question was enunciated in The Federalist No. 78 where Hamilton said:

> "Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Consitituion; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE NOR WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.
>
> This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive."

These general principles are being expounded upon here because they have specific application to the facts of this case. This appeal is concerned with the actions of a United States District Judge who seems to be attempting to substitute will and force for judgment. Although this lawsuit started out as an action between the S.E.C. and Sloan, Judge Ward has become so personally embroiled in a running controversy with the appellant that it seems as though he has taken over the prosecution of this case and that the S.E.C. has been left standing on the sidelines. This circumstance places the appellant in a difficult position. In order to effectively argue this appeal he must to some extent engage in a direct attack on the judge himself. However, a direct attack upon the judge is statistically unlikely to succeed and indeed is more likely to backfire and place the appellant himself in an unfavorable light. Also by attacking the judge, the appellant is placing himself in the position where the best result he can hope to achieve is that the Court of Appeals will direct that this case be assigned to another judge. Although this result will bring the appellant immediate relief from the problems he is facing because of the actions of Judge Ward, it will do little to terminate the protracted litigation which has been continuing now between Sloan and the S.E.C. for nearly five years. For this reason, the appellant is loathe to make unfavorable statements about Judge Ward himself. Unfortunately, Judge Ward poses such an immediate threat to the liberty and security of the appellant that a direct attack becomes necessary. Indeed, it should be obvious from the record of this appeal and from all of the facts involved in this case that Judge Ward is determined to imprison the appellant and will use any pretext available to bring a criminal prosecution against the appellant if the opportunity arises. Judge Ward cannot do so now primarily because under the American system of justice there is no such thing as a trial ex

parte or a trial in absentia. For this reason, Judge Ward cannot prosecute the appellant unless the appellant is actually in custody. Needless to say, the appellant under these circumstances has no intention of voluntarily placing himself in custody.

To see how far afield Judge Ward has gone in his single minded efforts to prosecute Sloan, it is appropriate to examine the law of contempt which is, of course, the law directly involved in this appeal.

In Re Oliver 333 U.S. 257, 275 (1948) the Supreme Court enunciated a fundamental principle which applies to all contempt cases when it said that procedural due process "requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way or defense or explanation." Quoted in Re Green 369 U.S. 689, 691-692 (1962). An examination of the record of this case quickly demonstrates that none of the required elements are present.

To begin with, there has been neither a hearing nor an opportunity for the defendant to testify in his own behalf. It is almost inconceivable that a federal judge would find a defendant to be in contempt of court without giving him a hearing. There can be no deviation from the principle that some sort of hearing must be available. Where a contempt has been committed during a trial in the presence of the judge, a summary adjudication of contempt may be necessary to preserve the dignity and authority of the court, (see e.g. Sacher v United States 343 U.S. 1, 11-12 (1952)) but it has been established that even in those cases the court must give a hearing to the extent of allowing the

contemnor to respond to the charges against him. In the case of an attorney who has interfered with the administration of justice during the course of a trial, the accused contemnor must be given the opportunity to respond, Taylor v Hayes 418 U.S. 488, 498-499 (1974) and the same principle applies to contempt of a legislative body. Groppi v Leslie 404 U.S. 496, 502 (1972).

In the case at the bar, it is obvious that no contempt occurred in the presence of the court. Therefore a full evidentiary hearing was necessary if Judge Ward was to adjudge the defendant to be in contempt. The last time Judge Ward even saw the defendant was on January 17, 1975, the occasion when Judge Ward signed the order of injunction. Nothing which occurred on that occasion formed the basis for the alleged contempt. Thus it is apparent that this is not a case where the judge needed to make use of the contempt power in order to preserve the dignity and authority of the court. Indeed, far from preserving the dignity and authority of the court, Judge Ward has acted in a manner demeaning to the court by becoming embroiled in what is obviously a personal dispute between himself and the appellant.

An appropriate point was made by Supreme Court Justice John Paul Stevens in his dissent in Groppi v Leslie 436 F. 2d 331 (7th Cir. 1971) when he was sitting as a judge of the United States Court of Appeals. There Mr. Justice Stevens observed that the improper use of the contempt power may have the result of making martyrs out of common criminals. The fact that a defendant may be guilty of a crime and the use of the contempt power may be the only expeditious means to punsih the wrongdoer is really irrevelant because the improper use of the courts power, even as a means to accomplish an appropriate end, must inevidably result in the erosion of confidence in the judiciary.

In the case at the bar, the S.E.C. has accused Sloan of committing a number of crimes, and indeed it must do so in order to prevail in an action for injunctive relief. See United Transportation Union v State Bar of Michigan 401 U.S. 576, 583 (1971). The briefs filed in the district court in the prior lawsuit now on appeal under docket no. 74-1436 are filled with accusations that Sloan has committed such crimes as "perjury," "subordination of perjury," "misappropriation of assets" and "fraud." However, in spite of the serious sounding nature of these charges it is obvious that the S.E.C. has been unable to interest the U.S. Attorney in instituting a criminal prosecution against Sloan. For that matter, the S.E.C. itself is remarkably hazy on the particulars of the crimes which Sloan has supposedly committed. In fact, one would be entitled to wonder whether the real criminal is not the S.E.C. itself.

The circumstances of this case are bizarre. Certainally none of the four cases cited in the brief for the S.E.C. (App. 15-17) bear any resemblance to this one. Among the factors that contribute to the unusual nature of this case are the fact that the defendant is appearing pro se and the fact that Judge Ward, as a matter of general policy, does not hear oral argument on motions and makes all decisions on the papers. Had the defendant been represented by counsel or had the defendant been given the opportunity to appear in court to contest the motion for contempt it is unlikely that this lawsuit would have followed the course it has taken. For example, the Code of Professional Responsibility of the American Bar Assocation, Ethical Consideration 7-22 states:

> "Respect for judicial rulings is essentil to the proper administration of justice; however, a litigant may, in good faith and within the framework of the law, take steps to test the correctness of a ruling of a tribunal.

It is clear that Sloan has respect for judicial rulings in general.

If Sloan did not have respect for judicial rulings and if he did not have confidence that the courts would ultimately find the positions he has taken to be correct, he would not be devoting the tremendous amount of time, effort and money required to perfect this and the other related appeals. On the other hand, Sloan does not respect Judge Ward and it should be apparent that the reasons for which Sloan does not respect Judge Ward are justified in this case.

In S.E.C. v Samuel H. Sloan & Co. 71 Civil 2695, Judge Ward at one point stated that he was considering disciplining Robert S. Taylor, Esq., the former attorney for the defendant. (See trial transcript p. 107). Ultimately, however, Judge Ward took no action against Mr. Taylor. The point is that if Mr. Taylor or some other attorney had appeared as counsel for the defendant in the instant case and if the proceedings had gone as they have it is not entirely unlikely that disciplinary proceedings would have been instituted against Mr. Taylor. Actually, it is unfruitful to speculate as to what might have occurred but the point is that if Judge Ward had entered an illegal order and if Sloan had been represented by an attorney any attempt to challenge the validity of the order might have resulted in disciplinary proceedings against the attorney. Indeed, that is precisely what occurred in Re Green, supra. Since it is unlikely that any attorney would have been willing to stand up to Judge Ward in the face of almost certain disciplinary proceedings against him, the result might be that the attorney might wind up advising Sloan to do something contrary to Sloan's best interests. Fortunately, that problem cannot arise because there is no attorney representing Sloan in this case and that may in part be the cause of the unique features of this appeal.

In the action which is now the subject of this appeal the S.E.C. almost completely ignored the rules of court. To begin with, the summons and complaint were never properly served. Rule 4(c) F.R. Civ. P., states:

> "Service of process shall be made by a United States Marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely when substantial savings in travel fees will result."

The S.E.C. did not comply with this rule. The United States Marshal has never attempted to make service on Sloan nor has any affidavit of service been filed in this case. It is true, as the S.E.C. says in its response on this point, that Sloan received a telephone call which notified him that a complaint had been filed and that later an attorney for the S.E.C. handed him a complaint (which apparently did not have a summons attached). The S.E.C. contends that as a result the "notice" requirement was satisfied. This may be true to the extent that Sloan knows that a lawsuit has been filed which names him as a defendant but the fact remains that the Rule 4(c) has not been complied with.

The S.E.C. apparently believes that jurisdiction has attached because the temporary restraining order signed by Judge Ward contained a sentence which said:

> "Service of this Order, Summons, Complaint and Supporting Affidavits may be made by representatives of plaintiff Commission." (A-14).

However, this order was not signed until after Sloan had been handed a copy of the complaint. (A59-60). Furthermore, Rule 4(c) requires that a specific person be appointed to make service of process and no specific person was appointed in this case. Furthermore, the rule pro-

vides that the grounds for the appointment must be that "substantial savings in travel fees will result." Since Sloan lived in Bronx, New York at the time this lawsuit was commenced there was no need for the S.E.C. or the court to be concerned with the savings of travel fees. In addition, Mr. Hortman, the attorney who handed Sloan the complaint was a long time antagonist of Sloan's who was, for all practical purposes, a party to this action. It is well established that an individual personally interested in the outcome of a lawsuit cannot be permitted to make service of the summons and complaint.

Perhaps this point is unduly technical. However, the fact is that the S.E.C. has accused Sloan of what amounts to, at best, a highly technical violation of a highly technical rule (see S.E.C. v Reiter 146 F. Supp. 552 (S.D.N.Y. 1956))and there is no reason why the S.E.C. should not be held to strict observance of the Federal Rules of Civil Procedure.

Next, the S.E.C. failed to give Sloan adequate notice in its notice of motion for contempt. The moving papers were served by mail on March 25, 1975 (App. 9) but the return date for the motion was April 1, 1975. (App. 20). Thus Sloan was given a total of seven days to respond. Rule 9(c)(2) of the General Rules for the Southern District of New York requires that in all motions there must be at least ten (10) days notice. Since in this case the notice of motion was served by mail, Sloan was entitled under Rule 6(e) F.R.Civ. P. to an additional three (3) days notice. Thus, the S.E.C. was required to give Sloan thirteen (13) days notice and the notice actually given to Sloan by the S.E.C. was six (6) days less than that required by the rules.

Of course, Sloan was in the hospital at the time and was experiencing

great pain and suffering and could not have appeared in court in any event. However, this fact does not absolve the S.E.C. of the duty to comply with the court rules. Indeed, it is suprising that the docket clerk even accepted the motion papers of the S.E.C. for filing. The general practice in the New York State Courts as well as in the Southern District of New York is that all motions filed without adequate notice are automatically denied without prejudice or are marked off the calendar. On this point alone, the decision of Judge Ward in granting the motion (which was unopposed) should be reversed. The ten daynotice requirement is by no means a technical rule. In fact, the notice requirement is constitutional in derivation. While the notice requirement varies from jurisdiction to jurisdiction and there is not mechanical test which determines how much notice is required to insure due process of law (see Ungar v Sarafite 376 U.S. 575, 589 (1964)) there can be no doubt that in the Southern District of New York due process of law requires that the defendant be given at least ten days notice plus three days if service of the notice is by mail.

Next, the contempt order is invalid because Sloan was not within the jurisdiction of the Southern District of New York at the time it was entered. This point concerns the extent of the power of a federal court. In theory a judge is not supposed to take a case over which he has no jurisdiction. In practice, a judge can frequently usurp jurisdiction and can cause severe injury to the rights of a litigant even if he happens to be ultimately overruled on appeal. For example, a judge in a New York State court can enter a money judgment against a California resident where no service of process has been effected and even if his actions are illegal, every State of the United States will be required by the constitution to give that judgment full faith and credit even

though the judgment is invalid.

By the same token, the fact that the summons and complaint were never properly served upon Sloan has not stopped Judge Ward from entering an injunction against Sloan and the fact that the judgment is legally invalid, for failure to comply with Rule 65, for example, has not stopped Judge Ward from adjudging Sloan to be in contempt of court. However, the fact that Sloan does not happen to reside in Judge Ward's bailiwick would seem to nullify any order he might enter and thereby demonstrate Judge Ward's lack of jurisdiction over this case. The problem which Judge Ward has encountered would have been averted if Judge Ward had followed Sloan's suggestion of transferring this case to the Western District of Virginia, Lynchburg Division. (App. 127).

It is well established that the exercise of the contempt power must involve punishment. It is axiomatic that for the court to punish it must have the power to punish. Indeed the contempt power is normally exercised in circumstances where there is no question of the courts power to punish. For example, where the contempt involves a witness who has refused to obey an order to testify in a judicial proceeding, he may be confined until compliance provided that he is capable of complying with the courts order. Shillitani v United States 384 U.S. 364, 370-371 (1966). In practice, the power of the court to adjudge an individual to be in this type of contempt is never invoked unless the contemnor is on the witness stand, under oath, and has refused to answer a question although directed by the court to do so. In this circumstance, the U.S. Marshal is generally close at hand and can be summoned to the courtroom. Thus, there is no question that the court has the power to enforce its own order. The same is true in the case of the attorney who interferes with the administration of justice during the course of a trial.

In the case at the bar, there is irony in the fact that by depriving Sloan of his constitutional right to be heard, Judge Ward deprived the court of the opportunity to enforce its own order. It should be noted that Sloan asked for a hearing and in addition for a trial by jury. (App. 120). Judge Ward denied these requests. Had Judge Ward granted Sloan's motion, Sloan would have appeared in court at which time Judge Ward would have had it within his power to enforce his own order. However, Judge Ward decided not to give Sloan a hearing and, as a result, his order is illegal and void. Re Sawyer 124 U.S. 200 (1888).

The S.E.C. has argued that even an invalid order must be obeyed. (App. 17). However, the case on which the S.E.C. relies for this proposition is United States v United Mine Workers 330 U.S. 258 (1947) which was impliedly overruled on this point by Re Green, supra. See Re Green 369 U.S. at 693-694 (Harlan, J., dissenting in part and concurring in part). In United Mine Workers the Supreme Court held that disobedience of a temporary restraining order issued by a court whose claim to jurisdiction over the underlying proceeding is not frivolous may be punished as a criminal contempt even if it is determined on appeal that such jurisdiction was lacking. This holding is clearly erroneous and if it were still law the consequence would be that even if Judge Wards injunction is vacated by the Court of Appeals the defendant could still be punished for contempt of that injunction at some future date. Clearly, this would be a monsterous result, albeit no doubt pleasing to the S.E.C., and would not be in accordance with the present state of the law. Under the present law, the way to demonstrate the invalidity of a court order is to violate the order and to wait for prosecution to be instituted. This route, of course, is not to be recommended to the faint hearted. See United States v Ryan 402 U.S. 530, 532 (1971).

cf. United States v Nixon 418 U.S. 683, 691 (1974). Nevertheless, it may be the only route available under many circumstances.

Consider what would happen, for example, if a federal judge were to place the school system of a major metropolitan area in federal receivership in order to insure compliance with his own school busing order. The injured party in such a case might be a seven year old student who, in all likelyhood, would not be an actual party to the suit in which the order was entered and therefore would not be able to appeal. In order to demonstrate the illegality of the order, the seven year old might be required to refuse to ride the school bus and to refuse to attend the school which the federal judge had ordered him to attend. This would put the judge in the position of having to decide whether to incarcerate the contumaceous seven year old in order to preserve the "dignity and authority" of his own busing order.

In the court below, the S.E.C. referred to its motion as being one for civil contempt. Presumably, the S.E.C. sought to have the defendant adjudged to be in civil contempt in order to avoid having to meet the requirements of Rule 42(b) F.R. Crim. P. Had the S.E.C. sought an adjudication of criminal contempt there can be no question that it would have been required to state the essential facts constituting the contempt as such (which it has failed to do, see App. 20) and to proceed via an order to show cause or an order of arrest. In addition, there would have been a hearing at which presumably the S.E.C. would have been required to call witnesses.[4] In addition, Sloan would have been entitled to a trial by jury, Bloom v Illinois 391 U.S. 194 (1968) and the S.E.C. would have been required to prove its charges "beyond reasonable doubt."

4. However, Judge Ward and the S.E.C. have both referred to the colloquy which took place on January 17, 1975 as a hearing although no witnesses were called by the S.E.C.

It is obvious that the S.E.C. could not have prevailed at such a hearing unless the S.E.C.'s case consists of substantially more than what can be found in the record of this appeal. Indeed the only reason for which the S.E.C. might request an adjudication of civil contempt would seem to be that the S.E.C. feels it would not be able to prevail in a motion for criminal contempt. One interesting feature of the S.E.C.'s brief is that it seems to be arguing that Sloan is really in criminal contempt while at the same time it asks the court to adjudge Sloan to be in civil contempt. For example, on p. 7 of its brief the S.E.C. states (App. 17):

> "The need for relief has even greater force here in that defendant Sloan has already been adjudicated in violation of the federal securities laws and continues to do so in defiance of an injunction."

This statement is typical of the sweeping characterizations of illegality which have frequented the briefs submitted by the S.E.C. during the past four years.[5] Although Sloan is clearly being charged with illegal conduct, there is no specific statement as to what illegal acts Sloan has committed or what law, if any, Sloan has violated. Furthermore, although the claim is made that Sloan has been "adjudged in violation of the federal securities laws" there is no statement as to what judge of what court made this adjudication, or on what date and what "laws" Sloan is adjudged to have violated. For that matter there is no explanation as to how it happens that Sloan has been "adjudged to be in violation of federal securities laws" and yet Sloan is a free man and no attempts have been made to bring criminal prosecution against

5. The fact that the style of these accusations is generally the same is not suprising since almost all of these briefs have been submitted under the name of William Nortman, the attorney who was originally assigned to the investigation of Sloan and who was subsequently promoted to the position of Assistant Regional Administrator of the S.E.C.

him. The mind boggles if one searches for a reasonable explanation. How is it that Sloan is able to avoid prosecution? Does Sloan have some sort of special deal with the judge? Has Sloan paid off the prosecutor?? Is Sloan the federal securities law equivalent of Agent 007, who has a "license to kill?"

Of course, the answer, which is not likely to be admitted by the S.E.C., is that Sloan has committed no crime or, in the alternative, the S.E.C. well knows that no jury in the Southern District of New York would convict Sloan of whatever crime it is that he has committed.[6] The problem of jury nullification, which is known to exist in securities act prosecutions, is discussed in Furman v Georgia 408 U.S. 238, 249 n.9 (1972) (Douglas, J., concurring) and the conclusion is reached that

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6. Spurious claims of illegality are almost a hallmark of S.E.C. action. For example, in order to be approved by the S.E.C., every Securities Act registration statement must contain the following words:

> "THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE."

But is it really a criminal offense? Nowhere in the U.S.Code does there seem to be a provision which specifically makes this a criminal offense. In fact, the statement is not even true. The S.E.C. does, for all practical purposes, approve the adequacy of the prospectus and, among other things, the S.E.C. will consider inadequate any prospectus which does not state that the S.E.C. has not passed upon the adequacy of the prospectus.

Although it is possible that a statement of the type involved here would be illegal under an application of the broad anti-fraud provisions of federal securities laws, there is no reasonable justification for a requirement that this statement appear on every prospectus approved by the S.E.C. A prospectus, after all, is intended to provide potential investors with information about the issuer of securities and is not intended to purport to give legal advice. This point is made here because the fact that this statement appears on the cover of every prospectus which is issued demonstrates how successful the S.E.C. has been in intimidating and coercing almost everybody to follow the dictates of the S.E.C. For example, on the cover of every registration statement filed with the S.E.C. can be found the words:

(footnote cont. p. 27)

that the fact that there is a jury nullification problem is an indication that the punishment involved is "cruel and unusual" and therefore is contrary to the rights guaranteed by the Eighth Amendment to the Constitution. For a punishment to be "cruel and unusual" it need not involve torture or other barbaric acts.

> "In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the clause - that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others."

Furman v Georgia, supra 408 U.S. at 274 (Brennan, J., concurring). For example, "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." Robinson v California 370 U.S. 660, 667 (1962).

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footnote 6. continued from p. 26

> "The registrant hereby amends this Registration Statement on such date or dates as may be necessary to delay its effective date until the registrant shall file a further amendment which specifically states that this Registration Statement shall become effective in accordance with Section 8(a) of the Securities Act of 1933, or until the Registration Statement shall become effective on such date as the Commission, acting pursuant to said section 8(a), may determine."

> Because of this statement, the S.E.C. is able to tie up the effectiveness of the registration of a security for six months, a year or longer even though by law, a registration statement is supposed to become effective in twenty days. The reason that all issuers of publically traded securities are willing to cooperate so docilely with the S.E.C. in an area where the S.E.C. has no statutory authority to act is clearly that the issuer of securities are intimidated and frightened as to what will happen to them if they indicate that they are not particularly inclined to cooperate with the Commission.

In this case Sloan has been accused of the commission of a crime and has been severely and arbitrarily punished. The punishment in this case has been sufficiently severeas to be proscribed by the constitutional ban on cruel and unusual punishments. The punishment is unusual in that it is not of the type customarily inflicted in contempt cases. The unusual nature of the punishment here has been made possible because of procedural errors which were committed by Judge Ward. There can be no doubt that recent actions of the U.S. Marshal have punished Sloan and have interfered with Sloan's personal freedoms and with his constitutional right to be left alone.

> "This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existance in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people." Trop v Dulles 356 U.S. 86, 102 (1958).

This,of course, is the state in which Sloan finds himself. He is subjected to a fate of ever increasing fear and distress. He is unable to enjoy the most elementary freedoms which normal citizens take for granted.

"The justification for coercive imprisonment as applied to civil contempt depends upon the ability of the contemnor to comply with the court's order." Shillitani v United States, supra 384 U.S. at 371 citing Maggio v Zeitz 333 U.S. 56, 76 (1948). At the same time a court must exercise "[t]he least possible power adequate to the end proposed." Id. at 371 citing Anderson v Dunn 6 Wheat 204, 231 (1821); In re Michael 326 U.S. 224, 227 (1945). In this case, Judge Ward has inflicted a severe punishment upon Sloan which nevertheless is not "adequate to the end proposed." "The very fact that a series of contempt citations has not failed to check the defendants contemptuous acts .... demonstrates that

another citation is unlikely to do so." Counspeti v Pennsylvania 418 U.S. 506, 521 (1974) (Marshall, J., concurring in part). Indeed, the punishment inflicted here is unlikely to coerce compliance with judicial authority, a fact which is reflected in the contempt order itself. (App. 146-147). Far from coercing compliance with judicial authority, a contempt citation which is arbitrary, unreasonable and contrary to law is likely to provoke lawless conduct.

In Shillitani v United States, supra 384 U.S. at 368 the Supreme Court, citing Gompers v Buck Stove & Range Co. 221 U.S. 418, 499 (1911), observed that "as distinguished from criminal contempt proceedings, civil contempt proceedings involve an act of disobedience which consists solely in refusing to do what had been ordered, not in doing what had been prohibited." Since the D.C. claims that the acts which Sloan has committed are not merely disobedient, but are illegal in every sense, it is clear that under this standard Sloan has been adjudged to be in criminal contempt although he has never been accorded the rights to which he is entitled under Rule 42(b) F.R. Crim. P. in criminal contempt proceedings. Clearly, Sloan does not hold the "keys to his freedom in his pocket" see In re Wyatt 117 Fed. 448, 461 (8th Cir. 1902), since compliance with Judge Ward's second injunction may be impossible or it may result in a finding that Sloan has violated Judge Ward's first injunction. Furthermore, there is a potential for punishment in this so-called "civil contempt" proceeding which is far more severe than that which could be imposed in a criminal case. If the books and records which the D.C.C. claims to be seeking do not exist, Sloan might well be subjected to life imprisonment under the guise of an adjudication of "civil contempt." For that matter the confinement of the alleged contemnor in circumstances such as these must self-evidently fail to accomplish its intended purpose since from the moment the defendant becomes confined it will be beyond

Lord Chief Justice George Jeffreys is notorious in the anals of legal history. "Nobody knows how many hundreds of men, innocent of unproved guilt, Jeffreys sent to their deaths in pseudo trials." Furman v Georgia, supra 408 U.S. at 254 (Douglas, J., concurring). "The hundreds of judicial murders committed by Jefferys and his fellow judges were totally inconceivable in a free American republic." Id.[7]

It is true that many of the specific abuses committed by Lord Chief Justice George Jefferys could not occur in the present judicial system. But there are indications that Judge Ward, if left to his own devices, would be equally repressive. For example, when the appellant was arguing in the Court of Arpeals for a stay of one of Judge Ward's orders, the case called on the calendar just before his was one in which Judge Ward had sentenced a defendant, who had apparently been convicted by the court for conspiring to violate the drug laws, to two consecutive fifteen year prison sentences. Although the appellant does not know the name of that case, or how it was decided on the merits, the fact is that a sentence of two consecutive fifteen year prison terms is appalling and certainally does not add to the appellant's sense of security. It is submitted that the abuses committed by Judge Ward in this and in the related proceedings now on appeal are so flagrant and shocking that consideration by Congress should be given to removing Judge Ward from the bench. This, of course, would involve proceedings which the courts are not empowered to perform.[8] Chandler v Judicial Council 398 U.S. 74, 141 (1970). (Black J., dissenting). However, the Court of Appeals can remove a judge from a particular case. See e.g. United States v John Anthony Taylor 487 F. 2d. 307 (2d Cir. 1973). An analogy can be found in an action of the New York State Supreme Court, Appellate Division, First Department when

8. But were they really? See e.g. Rosenberg v United States 346 U.S. 273 (1953).
9. Judge Ward, incidently, has indicated to the appellant that he plans to spend the rest of his life on the bench.

[illegible]

[illegible] To be sure, the removal of a judge from a particular case is not a matter to be taken lightly [illegible] should not be done except under the most exceptional circumstances. [illegible] v United States 389 U.S. 96, 95 (1967). Nevertheless, when these exceptional circumstances occur, as it is submitted they have here, the court of appeals should not hesitate to act. See e.g. Occidental Petroleum v Chandler 303 F. 2d 55 (10th Cir. 1962) (en banc), cert. denied 372 U.S. 915 (1963); Texaco Inc. v Chandler 354 F. 2d 655 (10th Cir. 1965), (en banc) cert. denied 383 U.S. 936 (1966); O'Brien v Chandler 352 F. 2d 987 (10th Cir. 1965), (en banc) cert. denied 384 U.S. 926 (1966). At the same time Judge Chandler is still on the bench. See Burkett v Chandler ___ F. 2d. ___ (10th Cir. 1975) cert. denied ___ U.S. ___ (Oct. 6, 1975). But the actions of Judge Chandler, although perhaps vexatious as well as legally wrong, do not rise to the level of calculated malice which has been displayed by Judge Bard.

THE D.A.C. HAS FAILED TO MAKE A SHOWING SUFFICIENT TO JUSTIFY CONDUCTING CONTEMPT PROCEEDINGS.

An examination of the record of this appeal reveals a startling lack of substance to the charges by the D.A.C. In the first place, the affi-

davit presented by the S.E.C. in support of its claim that Sloan is in contempt of court (Arp. 21) consists primarily of third rate hearsay. The affidavit is the sworn statement of one Ira P. Spindler ("Spindler"). However, there is little in the affidavit which is concerned with facts which are within the personal knowledge of Spindler. The affidavit itself in paragraph 3 states that it is based upon "personal knowledge of the facts, correspondence and other documents contained in the files of the Commission, information received from the National Quotation Bureau ("NQB"), information contained in the pleadings, affidavits and transcripts of hearings in this action, discussions with various staff members of the Commission, and upon information and belief."

In short, the affidavit states that it is based almost completely on hearsay. In other words, the S.E.C. seeks to have Sloan sent to jail in reliance upon assertions made by Spindler which are based upon what Spindler supposedly has learned from "discussions with various staff members of the Commission" as well as upon "information and belief."

No explanation is given by Spindler as to why the staff members of the Commission with whom he had his discussions could not come forward and submit their own affidavits. Moreover, the information which Spindler supposedly has gleaned from these staff members of the Commission itself seems to be based upon hearsay.

The most serious accusation made by Spindler in the course of his entire affidavit is that Ralph Pernick ("Pernick"), an S.E.C. employee, called Sloan on the telephone and Sloan told Pernick that he was "not particularly inclined to cooperate" with the Commission. (Arp. 24). Since Spindler does not say that he was listening in on the line when this conversation took place, one would assume that he got his information directly from Pernick. However, it turns out that Spindler did not get

his information from Pernick but rather got his information from a letter which Mortman sent Sloan (App. 30-31). The letter states that its purpose "is to confirm yesterday's conversation between yourself and Ralph Pernick, a staff member of the New York Regional Office of the Securities & Exchange Commission." This letter purports to set forth accurately the substance of what was said during a conversation the previous day between Pernick and Sloan. In fact, however, the letter contains numerous false representations. These false representations are characteristic of Mortman, who has demonstrated during the course of his four years of litigation against Sloan that he is a man who has scant regard for the truth. This is a fact which Sloan has not hesitated to point out to the court. (See e.g. A-135 as well as the Appellant's brief in 74-1456 p. 18).

Mortman for one third contended for two and one half years that Sloan had never submitted to the S.E.C. an April, 1971 trial balance. This claim was proven to be untrue when Judge Ward ordered the S.E.C. to search its files for the trial balance. As a result, the S.E.C. found the trial balance and stated that it had been found in the files of "the attorney who had this case two years ago." (Trial Transcript p. 352).[9] Mortman has also been implicated by the testimony of Fanoff, an S.E.C. staff investigator, in what amounts to an attempt by Mortman to contrive testimony for later use in court. At the administrative hearing on November 1, 1972 Fanoff testified on cross as follows (transcript

9. Although Mortman had been assigned to Sloan's case for a time in 1971, the primary authority over that case was later reassigned to George Brandt after Mortman had been promoted. The S.E.C. specified that the documents had been found in the file of Brandt (Transcript p. 558). Mortman, however, was Brandt's superior and had continued to be involved in Sloan's case.

p. 204-5):

"Q. Is it your testimony that the April 30th trial balance was never forthcoming from Sloan?
A. That's correct.
Q. Did you then go to the office to take over an April 30th statement?
A. No, I did not.
Q. Is there any reason why you did not?
A. I believe I was directed not to bother to press him for the April figures.
Q. Tell us who directed you that way.
A. I believe it was Mr. Nortman.
Q. Did you then request a trial balance on May 31st?
A. Yes, I did.
Q. What was the result of that request?
A. I never received that one either.
Q. Did you go to his office to attempt to examine records.
A. No, I did not.
Q. Was it similar to the prior instruction not to bother with it
A. Yes.
Q. From Mr. Nortman?
A. Yes.
Q. Was any reason given for that?
A. Not to me."

The instruction by Nortman "not to bother to press Sloan for the April figures" has added significance in light of the relevation, which did not come until more than one year later, that the S.E.C. had received the April figures from Sloan and that these figures had been located in the files of "the attorney who had this case two years ago."

Nortman was also a member of the S.E.C.'s team of attorneys who had claimed among other things that Sloan had never prepared a capital computation for any of the months in 1971. The S.E.C. never proved this claim. Indeed, it never even indicated that it had requested Sloan to produce the capital computations for that year. At the administrative hearing on November 2, 1972, Sloan testified as follows (Transcript p. 331):

".....for every single month, in 1971, I have a capital computation, and they are available in my office and Mr. Ramsey or anybody can come down and look at my records for that period, and see the capital computations for all those months."

The S.E.C. did not dispute this testimony nor did the S.E.C. take

on Sloan on his offer to show the S.E.C. the capital computations for 1971. Nevertheless, in proposed findings of fact submitted to Judge Ward in 1973 in paragraph 24 thereof, the S.E.C. continued to claim that Sloan had never prepared the capital computations. Judge Ward incorporated this finding in paragraph 15 of his decision in S.E.C. v Sloan 369 F. Supp. 996, 999 (S.D.N.Y. 1974) as did the S.E.C. in its Decision of April 28, 1975. (App. 112). However, in its brief filed in 74-1436, the S.E.C. no longer contends that this finding of fact can be supported by the record.

When Sloan raised this point again in a post-trial motion, Rule 60(b)(3),to vacate the injunction on the grounds of fraud, misrepresentation and other misconduct of an adverse party, the S.E.C. filed a brief which said on page 13 thereof "the Commission wishes to respond briefly to [Sloan's] utterly false and defamatory remarks concerning the testimony of the Commission's staff. Among other things, this brief stated that "Sloan's magnanimous invitation to the Commission's staff in October, 1972 to examine his capital computations for 1971 was singularly unhelpful." (Brief p. 11). This statement implied that the records were not currently available in 1971. However, at the trial before Judge Ward, Nortman stated: "We will stipulate that the records are available for our perusal." (Transcript p. 638). Nevertheless, although the S.E.C. admits that the records Sloan had were available for its perusal, it states that Sloan did not have the required records and implies thereby that attempts were made to examine Sloan's records and it was discovered that the records did not exist. However, Sloan exposed the falsity of this claim through his cross examination of Kanoff in the trial before Judge Ward. There Kanoff testified (Transcript p. 180):

"Q. Between May 31st of '71 and August 16, 1973, you never went to the office of Sloan to examine his records.
A. As I recall, my visits from this point only were to pick up material rather than examine the records.
Q. As a matter of fact, Mr. Kanoff, the only time that you examined the records of Sloan and Company was on March 19, 1971, is that correct?
A. At your offices?
Q. That's correct.
A. I really don't recall, but I would go along with that."

From this and from an examination of the entire record of that case, it should be clear that the claims advanced by the S.E.C. in general and by Hortman in particular are often contrived and fictitious. The examples just given are not isolated in consistancies. In fact discrepancies of this nature abound the S.E.C.'s case. Nor has Sloan been the only person to complain about the obvious falsehoods found in the representations made by the S.E.C. In the respondent's brief filed on February 27, 1973 by Robert W. Taylor, Esq., who then was Sloan's attorney, the falsity of numerous claims made by members of the S.E.C.'s staff was amply demonstrated. That brief is part of the record in Sloan v S.E.C. U.S. C.A. Docket no. 75-4087. On page 1120 of the record, the brief says.

"A disturbing feature of the Division's presentation in its Proposed Findings of Fact is an inclination to misstate the evidence by arguing in a rather panoramic fashion and then citing the Official Transcript of the Hearing as if such arguments were in fact part of the record.
For example, on page 4, part III, paragraph 6, the Division states that Bruder's assignment was for the purpose of checking the books and records of Sloan to see if they are being maintained on a current basis and cites Tr. 21 as the reference.
No such testimony exists on Tr. 21."

"His brief then goes on to say (Record p. 1121-1122):

"With respect to the above, the Division's burden of proof requires them to prove the existance of the horse before trying to hitch up the cart.....
What is required is substantial evidence, and not merely language written into Proposals of Fact or Briefs containing citations to testimony, which in fact, never took place, (See NLRB v Columbia Enameling & Stamping Co. 306 U.S. 292 (1939).
This type of reporting only tends to obfuscate a complex record and makes it more complex for the trier of the facts to complete his task.
It is to be hoped that the misrepresentations of the record

contained in Division's Proposed Findings of Fact are inadvertent. I note, however, that this error appears repeatedly."

There is something deliberate and calculated about the repeated misrepresentations of fact which the S.E.C. staff has continued to make long after that brief was filed. These misrepresentations must be considered in light of the fact that the S.E.C. staff has never responded specifically to charges of unprofessional conduct made by Sloan and by his attorney although Thomas R. Beirne, an S.E.C. staff attorney, in a letter to the Commission dated March 15, 1974 stated:

> "Mr. Sloan's wild accusations regarding Commission investigators, attorneys and assistant regional administrators need not be dignified by a detailed response." (Record p. 1273).

It is reasonable to assume that if the S.E.C. staff was able to make a detailed response to the charges in question or if it had a reasonable explanation for its conduct, it would have come forward and demonstrated the same. Under any reasonable application of the doctrine of Respondeat Superior, the illegal conduct of Assistant Regional Administrator Nortman and the attorneys working under him which virtually leap out from the record can be imputed to the commissioners themselves particularly since they have refused to conduct a hearing or to investigate the charges which have been made by Sloan. Moreover, it seems that the more Nortman lies the higher he rises in the S.E.C. organization.[10] It should also be said that Sloan is not alone in his charges of unprofessional conduct on the part of the S.E.C. staff. An article in the New York Times of October 5, 1975 about the S.E.C.'s enforcement chief Stanley Sporkin reported that when asked by the times to respond to charges that the S.E.C. had engendered a "climate of fear" among lawyers practicing before it, Sporkin replied: "Nobody has substantiated these charges.... they are clearly a smokescreen."

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10. Nortman has recently been promoted to the position of Administrator of the Miami office of the S.E.C.

In its decision dated April 23, 1975 p. 5 footnote 20 (App. 114) the S.E.C. stated:

> "He also asserts that attorneys on our staff have engaged in unprofessional conduct. But these charges relate to the injunctive proceeding. Hence they are irrelevant here. Nothing has been alleged that goes to the merits of the matter before us."

However, earlier, when Sloan had made the same claim of unprofessional conduct to Judge Ward, the court in its decision of November 20, 1973 stated:

> "[T]he claim of alleged improper conduct of the S.E.C. attorney handling the case should in the first instance be presented to the Commission." (See Appendix in 74-1436 p. 38).

Thus it can be seen that Sloan, for the past four years, has made carefully documented charges of unprofessional and, indeed, illegal conduct on the part of the S.E.C. staff and the response Sloan has received from the S.E.C. staff is that the charges, although admittedly serious, "need not be dignified by a detailed response" from the S.E.C. staff and are "irrelevant" to any determination by the S.E.C. itself. Meanwhile the S.E.C. has adopted the strategy of harassing Sloan with litigation and of attacking Sloan's credibility presumably in an effort to attract attention away from the charges Sloan has made. For example, the S.E.C. staff has asserted that "Sloan has abused the court process, threatened witnesses and attempted to suborn perjury" (brief filed in 71 Civil 2695 dated April 19, 1974, p. 13), that "the Commission has amply demonstrated ..... that Sloan is neither honest nor truthful" (brief filed in 71 Civil 2695, dated July 5, 1974, p. 8), and that "[Sloan] has on numerous times lied under oath." (Appendix in 74-1436, p. 20).

Charges of this nature have been advanced repeatedly by the S.E.C. but have yet to be specified or documented. For example, the S.E.C. has claimed that Sloan has "on numerous times lied under oath" but it has never stated where, when and what lies, if any, were told by Sloan. Nor

has the S.E.C. referred the matter to the U.S. Attorney for criminal prosecution. From this it would seem that the S.E.C. staff is either itself guilty of criminal complicity or else has made numerous fraudulent representations to the court.

The Code of Professional Responsibility of the American Bar Association deals specifically with the question involved. For example, Disciplinary Rule 7-105 states:

> "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."

Disciplinary Rule 7-106 states in part:

> "(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:
> (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.....
> (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of the accused; but he may argue, on his analysis of the evidence, for any position or conclusion to the matters stated herein. .....
> (6) Engage in undignified or discourteous conduct which is degrading to a tribunal.
> (7) Intentionally or habitually violate any established rule of procedure or evidence."

Thus, when the S.E.C. accuses Sloan of abusing the court process, threatening witnesses, attempting to suborn perjury and lying under oath without being able to substantiate the charges, it violates a number of provisions of the Code of Professional Responsibility. The current accusations which form the basis of the contempt proceeding which is involved in this appeal should be considered in light of the fact that in the past the S.E.C. has made numerous spurious charges of criminal misconduct on the part of Sloan.

The affidavit submitted by the S.E.C. fizzles out rather rapidly. In paragraph 6 (App. 23) it says that on December 18, 1974 Spindler telephoned Sloan and in the course of the conversation which ensued,

Sloan told Spindler that it was his intention to wilfully violate Rule 15c2-11. (Ans. 23). However, it can be observed that when Spindler testified under oath on January 17, 1975, two months earlier, he stated that he could not remember what Sloan had said (A-124-125). In paragraph 10, Spindler says that on February 26, 1975 Pernick called Sloan and asked Sloan what time during the following week would be convenient for an examination of the books and records of Sloan & Company by representatives of the Commission. (Ans. 24). To this Sloan replied that no time during the week would be convenient and that he was "not particularly inclined to cooperate" with the Commission.

In paragraph 11 Spindler asserts that Pernick told Sloan that the S.E.C. staff wanted to examine various books and records and that it appeared that Sloan had not yet decided whether he would permit such an examination.

In paragraph 12 Spindler asserts that Sloan said something which obviously Sloan could not have said. Significantly the statement which Sloan supposedly uttered is not enclosed by quotation marks. Thus it is apparent that Spindler is not claiming that Sloan said those exact words. Indeed, in view of the facts of this case no reasonable person in Sloan's position could have made such a statement.

Paragraph 13 states that a letter written to Sloan by Spindler recording this conversation was mailed on February 27, 1975 but that the letter was returned unclaimed to the Commission. Paragraphs 14-18 recount how on March 5, 1975 and again on March 6, 1975 Spindler and a securities compliance examiner named Thomas Dolan had gone to Sloan's apartment and that "a woman, later identified as Salina Kristinsson" had informed them that Sloan was not there.

In paragraph 19 Spindler states that "Sloan has published quotations

in the pink sheets for various securities as recently as March 21, 1975." It goes to state that Sloan was in the hospital at the time with [illegible] "hospital room" is alluded to in the last sentence of this paragraph.

Finally, in paragraph 20, Spindler purports to sum up what was set in the preceding paragraphs with the statement that Sloan "has failed utterly to comply with the laws applicable to broker dealers." No specific law is cited in this paragraph, however.

The inadequacies of this affidavit as far as proving a case against Sloan are obvious. Significantly, in the memorandum submitted in connection with this motion, the S.E.C. does not state specifically what it believes it has proven by this affidavit other than to say in a general fashion that "Sloan wilfully disobeyed the order of injunction." The quality of proof here, which is more or less equivalent to the quality of proof in all of the proceedings instituted by the S.E.C. against [illegible] is so well below any recognized legal standard that a detailed analysis is not necessary. However, there is a more disturbing aspect to this case. From an examination of the affidavit it appears that the S.E.C. staff is once again guilty of unprofessional conduct. The affidavit of Spindler was obviously prepared by an attorney. Spindler who is a non-legal S.E.C. employee, is not an attorney. It is not likely that Spindler had much of a choice when it came to signing the affidavit even assuming his knowledge of the law was sufficient to inform him that the affidavit was improper. In addition he presumably was "advised" to sign the affidavit by the attorneys who prepared it and therefore if, for example, a charge of perjury were brought against Spindler based upon the affidavit he would be able to defend on the grounds that the S.E.C. attorneys told him to sign it. In addition, his job almost certainly depends on his willingness to sign an affidavit in circumstances such as these if one is needed by the S.E.C. Of course, the Civil Service

System would presumably have protected Spindler from losing his job if he had refused to sign the affidavit. At the same time a failure to sign an affidavit under these circumstances would almost certainally result in a loss of job status within the pecking order of S.E.C. employees.

The point is that the affidavit advances numerous conclusions of law which obviously do not come from the mouth of Spindler and, in addition, recites almost verbatum the contents of a letter written by Bortman to Sloan which Bortman obviously prepared with the thought in mind that it would later be used in court as evidence against Sloan. In short, the affidavit of Spindler consists almost completely of words which Spindler did not utter and relates facts and circumstances which are clearly outside of Spindler's personal knowledge and experience. In addition, it is sufficiently obvious that S.E.C. staff attorneys prepared this improper affidavit under conditions where Spindler had little choice but to sign. This point need not be expounded upon in great detail here. It is sufficiently clear that the question posed by this affidavit is not whether Sloan should be imprisoned but whether disciplinary proceedings should be instituted against the S.E.C. staff attorneys who caused this affidavit to be filed in court.

The record of this appeal is remarkable as much for what is not said as it is for what is said. For example, the record indicates that Bernick called Sloan on February 26, 1975 and evidenced a desire to see Sloan's books and records. However, the record does not indicate that any attempts had been made between January 17, 1975, when Judge Ward signed his "mandatory injunction," and February 26, 1975 to see Sloan's financial records. It must be remembered that the S.E.C. obtained the injunction from Judge Ward on an expedited basis because of a representation that immediate or irreparable loss, harm or injury would result to the public if the S.E.C. did not have the opportunity to examine Sloan's records

immediately. However, the moment after Judge Ward signed his injunction, the S.E.C. seemed to lose interest in the case and appears to have called Sloan more than one month later almost as an afterthought. Then, after another week had passed, two S.E.C. investigators dropped by Sloan's apartment and discovered that Sloan was not present, which should not have been surprising especially since, according to the S.E.C., Sloan had told Sernick that at no time during that week would it be convenient for the S.E.C. to examine his records.(App. 24). Needless to say, the S.E.C. did not serve an administrative summons on Sloan or go through any of the formalities which are generally thought to be necessary before government investigators can examine personal financial records. See United States v Powell 379 U.S. 48, 57-58 (1964). In this regard it should be said that the outer recognized limits of governmental power to examine financial records can be traced to Yakus v United States 321 U.S. 414 (1944); Shapiro v United States 335 U.S. 1 (1948) and United States v Morton Salt Co. 338 U.S. 632 (1950). These decisions, which are seemingly favorable to the S.E.C.'s position, have never been cited in any of the briefs filed by the S.E.C. presumably in part because they establish that required records and reports must be reasonably related to a specific purpose. Here, the S.E.C. has given no specific purpose but rather has expressed what amounts to a general curiosity as to what might be found in Sloan's financial records if indeed such records exist. As a matter of fact, it is questionable as to whether the S.E.C. even has a sincere desire to examine Sloan's records. From the record in this case it would appear that what the S.E.C. is really seeking is a court decision which establishes that it has the power generally to examine personal financial records. The year of 1975 will go down as a year in which the S.E.C. instituted numerous law suits seeking what it terms as "disclosure" of information about the way American corporations do business. In a recent example of the type of power the S.E.C. feels it should have, the S.E.C. obtained a consent order in December, 1975

which compelled Global Marine, Inc. to disclose information about covert operations undertaken in accordance with work Global Marine had performed for the CIA. It seems that Global Marine had been employed by the CIA in a top secret operation involving the recovery of a Soviet submarine from the bottom of the Pacific ocean. According to the S.E.C., Global Marine had violated S.E.C. rules by failing to disclose this fact in financial reports filed with the S.E.C. The New York Times quoted an unidentified S.E.C. spokesman as explaining the S.E.C.'s action by saying that in the future a corporation, before it undertakes covert operations, should approach the S.E.C. through the government agency such as, in this case, the CIA so that an agreement in advance can be made as to what needs to be disclosed. The consequence of this proposal is mind boggling. Clearly, the S.E.C. is seeking to establish itself as some sort of super-agency with the effective power to veto the proposals of other government agencies. In addition, the S.E.C. is seeking to have jurisdiction to regulate the private sale of securities and to inspect the financial records of virtually every public corporation and any privately held corporations. In short, if the S.E.C. wins in this and other cases which it has presently pending in court it will have been given the effective power to regulate virtually every commercial and financial transaction undertaken in the United States. There can be no doubt that the S.E.C. is seeking to expand the horizon of governmental power to examine financial records and this would seem to explain the reason for which the S.E.C. never cites past cases or relies on controlling precedant in this area.

The immediate circumstances which led to this lawsuit began on December 19, 1974, when the S.E.C. sent a registered letter to Sloan.[11] The text of this letter is included in the margin. It is hoped that this

11. "This correspondence is intended to notify you that representatives of the New York Regional office of the Commission will visit the office of Samuel Sloan & Co. on Thursday, December 26, 1974 for

(footnote 11 continued)

(footnote 11 continued from p. 45)

the purpose of conducting an examination of the books and records of the firm relating to the firm's operation and market making activities.

As you should know, Section 17(a) of the Securities Exchange Act of 1934 requires that every registered broker-dealer prepare, maintain and preserve its books and records in accordance with the Commission's rules and regulations. Periodic, special, or other examinations by examiners or other representatives of the Commission may be made at any time, or from time to time in the public interest or for the protection of investors. Rule 17a-3 promulgated under the Securities Exchange Act of 1934 sets forth, in detail, the books and records required to be made by a broker-dealer and Rule 17a-4 determines the periods of time for which certain enumerated records must be preserved for examination in an easily accessible place. Your attention is specifically directed to Rule 15c2-11(e) which requires a broker-dealer to maintain in writing, as part of his records, that information which a broker-dealer to maintain in writing, as part of his records, that information which a broker-dealer must have to lawfully submit quotations (i.e., make a market) in a security pursuant to the provisions of said Rule. These records, like you other records of operation are required to be preserved for examination.

The Commission examination team must have access to all the books and records of the firm in order to conduct a meaningful examination. Every effort will be made by the examiners to complete the examination promptly and efficiently without interfering with the normal course of business of the firm. The presence of a principal of the firm for the duration of the examination is not absolutely necessary, provided that back office personnel are instructed to make the firm's books and records available immediately on request and, where necessary, answer questions relating to the form and substance of books and records.

The Commission staff is not required by statute or policy, to notify broker-dealers of impending examinations. This notification, however, is intended to clarify the position of the staff with respect to problems encountered in the past, and serve as a response to your prior communication in which you stated, in effect, that you will not adhere to the abovementioned rules as you will refuse to make your records available in the absence of a search warrant. It is hoped that your cooperation will be forthcoming.'

(Note: End of footnote 11)

TEXT- continued:

court will not object too much to the inclusion of the text of this letter in this brief. The fact is that the S.E.C. has referred to this letter several times in the course of the proceedings below (A 19) as well as in its brief filed in this court (Brief for appellee in 77-7056 p. 5) and yet has never introduced the text of this letter in any affidavits or motion papers submitted in court. This in itself is ir-

proper since the letter "speaks for itself." It can be seen from this letter that the power which the S.E.C. believes itself to possess is the type of inquisitorial power which is subject to administrative abuse and which Congress has specifically sought to curtail. See United States v Powell, supra 379 U.S. at 54-55.

Of course, the problem present in this suit is not that the S.E.C. has been overzealous or that it has made frequent visits to Sloan's office, although to be sure it abused its authority in this respect in the past, but that the S.E.C. has evidenced no desire to examine Sloan's records except to the minimal extent which it seems to feel is necessary for the S.E.C. to be able to come into court and advance its claim that injunctive and other equitable relief should be granted. It can be seen from the record that from March 6, 1975, when Spindler and Dolan went to Sloan's apartment ostensibly to examine Sloan's records, until September 3, 1975 when Judge Ward signed the Order (App. 147), the S.E.C. made no effort whatsoever to examine Sloan's records. In fact, Sloan was on the telephone on numerous occasions with the office of General Counsel of the S.E.C. during this period (App. 133) and at no time did the S.E.C. state that it wanted to examine Sloan's records. During the same period the New York Regional Office of the S.E.C. made no effort to contact Sloan (App. 134). In fact, although the record of this appeal does not reflect this fact since the event in question occurred after Judge Ward signed his order, Sloan called Pernick in early September, 1975 and was informed that the New York Regional Office of the S.E.C. no longer had an interest in examining Sloan's records.[12] This did not represent

12. Since that time the office of General Counsel of the S.E.C. has expressed a desire to examine Sloan's records. However, the Office of General Counsel of the S.E.C. is in no way concerned with investigative or enforcement activities and is primarily concerned with representing the S.E.C. in the appellate courts (App. 133). The nature and untimelyness of its request makes it clear that the Office of General Counsel wants to see Sloan's records so that it

(footnote 12 cont. p. 48)

a change in circumstances (see App. 123). As Sloan said in his affidavit of July 24, 1975:

> "As far as I am aware the S.E.C. has no interest in examining my books and records. If they have such an interest they have not communicated it to me. (App. 122)."

This statement went uncontradicted by the S.E.C. It should be noted that although Sloan was struck by an automobile and suffered two broken legs he has never used that circumstance as an excuse to avoid compliance with the law. Of course it is one thing to fail to obey the law and something entirely different to fail to bow to the caprice of a United States District Judge who has repeatedly acted without legal authority and who has shown signs of being mentally unbalanced (see App. 125).

The fact is that the S.E.C. has cited no law which would entitle it to prevail under the circumstances of this case. Originally, the S.E.C. based its action for injunctive relief on its own interpretation of S.E.C. Rule 17a-4 (17 CFR 240.17a-4). Since that time the S.E.C. has held that Sloan did not violate Rule 17a-4. (See decision of April 24, 1975 p. 2 n. 6 (App. 111)). At the same time the S.E.C. revoked Sloan's broker dealer registration (App. 118). That act would seem to relieve Sloan of any requirement to comply with Rule 17a-4 because Rule 17a-4 only applies to brokers and dealers. Following this logic, Sloan immediately moved to vacate the injunction and dismiss the action on the grounds of "mootness" (App. 62). To this day, however, the S.E.C. seems to feel that Sloan is still governed by Rule 17a-4 because of pending proceedings in the Court of Appeals. (App. 43). By stretching the imagination somewhat, it seems possible that the S.E.C. contends that Sloan might be continuing to act as a broker or dealer even though his registration has been revoked. The problem with this theory, however,

f.12) will not be in the embarassing position of having to admit to the Court of Appeals that Judge Ward signed the contempt order at a time when the S.E.C. had completely lost interest in examining Sloan's records.

is that if the courts were to permit the S.E.C. to prevail on this point, the S.E.C. could come strolling into the office of every businessman in the United States and demand that he produce his financial records immediately because of the "compelling need" of the S.E.C. to check out his records to determine if he might be guilty of being an unregistered broker or dealer. The S.E.C. has already prosecuted at least one case under this type of theory. See S.E.C. v Century Investment Transfer Co. (CCH Fed. Sec. Law Rep. ¶93,232 [1971-72 Transfer Binder]).

Assuming that Sloan is not subject to Rule 17a-4, and the S.E.C. has yet to argue to the contrary, Judge Ward's injunction has become non-jurisdictional and therefore no contempt proceeding can be based on this injunction. The injunction, after all, says that Sloan is:

> "Ordered to permit immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Samuel H. Sloan and Samuel H. Sloan & Co. ..... as required by Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a) and Rule 17a-4 promulgated thereunder." (A 37).

Section 17(a) essentially gives the S.E.C. the authority to promulgate rules and any violation of this section must be tied to a violation of a rule "promulgated thereunder." Section 17(a) requires every broker or dealer, among others, to "make and keep" records and to furnish reports and such copies thereof as the S.E.C. by rule prescribes. Here, the S.E.C. is not alleging that Sloan has failed to "make and keep" records nor does it allege that Sloan has failed to provide copies of "required reports" to the S.E.C. Hence, Section 17(a) is wholly inapplicable. As a result, the S.E.C.'s authority must rest on its interpretation of Rule 17a-4. However, this rule simply requires that the records be preserved and the S.E.C. does not allege that Sloan has failed to preserve his records. Although the S.E.C. seeks to extend this rule by claiming that it contains an implied right of inspection, that right, if it exists, is void for vagueness, Connelly v General Constr. Co. 269 U.S. 385 (1925),

is overbroad, Eisenstadt v Baird 405 U.S. 438, 450 (1972), and lures the defendant into a "false sense of security" by prescribing acts which do not appear to be covered by the rule. Bouie v Columbia 378 U.S. 347, 352 (1964). In addition, there is no Article III case or controversy since the S.E.C. has yet to express a sincere desire to examine Sloan's records and, for one thing, apparently is unwilling to make a trip to Virginia to accomplish that purpose. What the S.E.C. is really seeking is a sort of declaratory judgment which will give it the right to examine Sloan's financial records if it ever feels a desire to do so. Under these circumstances, the S.E.C. is not entitled to invoke the judicial power because it has failed to show that an actual controversy exists. Griswold v Connecticut 381 U.S 479, 481 (1965). It is submitted, in fact, that under Article III of the Consitution the S.E.C. is never entitled to equitable relief because equitable relief is legislative rather than judicial in character and the S.E.C., as a government agency, has the power to institute criminal proceedings, a power which ordinary litigants do not have. See Linda R.S. v Richard D. 410 U.S. 614 (1973).

The injunction and subsequent contempt order have the effect of stripping Sloan of his Fourth and Fifth Amendment Constitutional rights, see Marchetti v United States 390 U.S. 39 (1968); Grosso v United States 390 U.S. 62 (1968); Haynes v United States 390 U.S. 85 (1968); Spevak v Kleen 385 U.S. 511 (1967); Garritt v New Jersey 385 U.S. 493 (1967); and Leary v United States 395 U.S. 6 (1969), as well as his right to be free from unreasonable intrusion into private premises, See v City of Seattle 387 U.S. 541 (1967). Moreover, even if Sloan is wrong on these points, his arguments have been presented in good faith and he has made use the remedy which is appropriate in the case of a wrongful S.E.C. investigation. Guaranty Underwriters Inc.

v Johnson 133 F. 2d 54 (5th Cir. 1943). Under these circumstances, he should not be punished. Id.

In addition, Sloan's constitutional rights have been violated because he has been singled out for special treatment by the S.E.C. The S.E.C. has never alleged that Sloan has caused even the slightest injury to the public. Sloan's principle offense seems to have been that he does not always agree with the S.E.C.'s concept of how much power the S.E.C. should have. As a result of this, Sloan has been besieged with litigation. No explanation has ever been given as to why the S.E.C. continues to bring proceeding after proceeding against Sloan and to devote a tremendous amount of manpower and energy to prosecuting an innocuous individual such as Sloan when presumably there are other more fruitful ways for the government to spend the taxpayers money.

Sloan has been singled out, not only because of the fact that the S.E.C. has devoted so much time and effort to suing him, but because of the operation of law. Section 21(g) of the Exchange Act, 15 U.S.C. 78u(g), has a new provision which limits the power of the S.E.C. to institute suit against a member of any "self-regulatory organization" such as the NASD. Although the law was amended after the S.E.C. instituted suit against Sloan, if Sloan were now a member of the NASD he could use this change in the law as an affirmative defense in the district court or on appeal. Bradley v Richmond School Board 416 U.S. 696, 711 (1974). In addition, it has always been obvious that the S.E.C. sued Sloan because Sloan was not a member of the NASD as a result of which the S.E.C. rather than the NASD had primary jurisdiction for regulating Sloan's day to day affairs. This, too, violates Sloan's constitutional rights as does any administrative regulation which singles out a small class of people for special treatment. Railroad Express Agency v New York 336 U.S. 106, 112-113 (1949) (Jackson, J., concurring); cf. Albertson v Subversive

Activities Control Board 382 U.S. 70 (1965).

The cases cited by the S.E.C. in support of its contempt motion are so hopelessly inappropriate as to require only cursory mention. The S.E.C. relies principally upon United States v United Mine Workers, supra a decision which has been overruled both de facto and de jure. It is noteworthy that Congress passed the Norris-La Guardia Act in order to curb judicial abuse of the equity power and nowadays the circumstances under which the courts can engage in strike breaking activities have been described with nearly scientific precision.

The S.E.C. cites Leighton v Paramount Pictures Corporation 340 F. 2d 859, 861 (2d Cir. 1965), a decision which relied upon United Mine Workers, supra. (App. 17). These two decisions are apparently cited to establish that the point that while an appeal is pending the district courts order is not automatically stayed. If that is the point the S.E.C. is seeking to establish with these two cases it need not do so because the appellant agrees that Judge Ward's order has not been stayed.

The S.E.C. also cites Penfield Company v S.E.C. 330 U.S. 585 (1947) which establishes that the contempt power is an appropriate way to coerce compliance with a subpoena. Since no subpoena has been issued here and it is hard to understand what the S.E.C. feels it has accomplished by citing this decision.

Finally, the S.E.C. cites Nilva v United States 352 U.S. 385 (1957). That decision is genuinely interesting although it would almost certainally not be followed today for a reason which is irrevelant to this appeal. Nowadays the Supreme Court would vacate and remand for further proceedings rather than remand for reconsideration of the sentence as it did there. See 352 U.S. at 396. However, the decision is interesting because the district judge in that case did almost precisely what Judge Ward did at

his so-called hearing on January 17, 1975. Significantly, when Nilva arrived in the Supreme Court, the Solicitor General confessed error, conceding that the trial court should not have admitted into evidence the trial transcript of a prior proceeding. 352 U.S. at 392 n. 6. As a result, the conviction with respect to the first two specifications were reversed. However, by a 5 - 4 vote, the Supreme Court sustained a guilty verdict based upon the third specification which was founded entirely on the defendants own testimony and upon books and records introduced into evidence by the defendant.

In the case at the bar, the defendant has been enjoined and adjudged in contempt based upon affidavits which the court received in the same erroneous manner that the court received the trial transcripts in Nilva. However, unlike Nilva, here the defendant had no opportunity to testify in his behalf during the course of the contempt proceeding and, during the course of the so-called "hearing" at the injunctive proceeding, although the defendant did testify, the S.E.C. did not base its case in any part on Sloan's testimony. Therefore, if this court is to follow Nilva, both the contempt order and the injunction must be reversed.

However, the S.E.C. did not cite Nilva as authority for the proposition that Sloan should be adjudged to be in civil contempt. Instead, the S.E.C. cited that decision for its "implicit approval of impoundment of books and records." (App. 16). Actually, the Supreme Court never approved the impoundment of books and records in that case because Nilva himself offered the books and records into evidence and the validity of the impoundment order was not an issue in that decision. It seems, however, that the S.E.C. cites Nilva as a way to urge Judge Ward to order that Sloan's books and records be impounded . In Nilva, the U.S. Marshal impounded the books and the F.B.I. promptly examined them. 352 U.S. at 389. Thus it seems that the S.E.C. wants to bring the U.S. Marshal and

the F.B.I. into this case when the S.E.C. itself has displayed remarkably little interest in Sloan's books. As noted previously, while the contempt motion was pending, Sloan was in Virginia for a long period of convalesence which was required when he sustained two broken legs by being struck by an automobile. It is reasonable to infer that had the S.E.C. attempted to examine Sloan's books during this period it would have succeeded. Since Sloan had two broken legs, it is unlikely that he would have run away. Nor can the S.E.C. claim that it did not know where Sloan was because, in fact, the S.E.C. was on the telephone with Sloan several times a week during this entire period. The fact is that at this point, Sloan was neither physically nor emotionally capable of providing resistance even assuming he had felt the desire to do so. Moreover, Sloan was not in his own residence and, in practical consequence, had possession but not control over his books. The fact is that had the S.E.C. representatives shown up at 917 Old Trents Ferry Road in Lynchburg, Virginia at any time during this period the person they would have been likely to have first encountered would have been all too happy to show the S.E.C. Sloan's books and records and Sloan himself would have been powerless to prevent it.

However, this would not have given the S.E.C. the type of victory it wants. To begin with, it appears that the S.E.C. wants to be spared the burden of traveling to Virginia to examine Sloan's records and would prefer to have the U.S. Marshall in Virginia impound the records and deliver them to the S.E.C. where the S.E.C. would be able to examine them at leisure. So, in essence, the S.E.C. is seeking to invoke judicial authority in order to get the U.S. Marshal to perform a task which the S.E.C. itself is too lazy to perform. In addition, what the S.E.C. is seeking is not an examination of Sloan's books but a subjugation of Sloan's will. It is not enough for the S.E.C. to examine Sloan's records. The S.E.C. seeks to examine Sloan's records with Sloan's cooperation,

guidance and consent thereby setting up Sloan as an example of the point that the power and authority of the United States Securities & Exchange Commission must ultimately prevail over the will of any single individual.

In motion papers filed in the Court of Appeals, the S.E.C. has cited one case which it did not cite below that being United States v Handler 476 F. 2d 709 (2d Cir. 1973). That decision involved a witness who was held in civil contempt after he had refused to testify in a Grand Jury proceeding after having been granted use immunity for that purpose. That decision is wholly irrevelant. The defendant here has not refused to testify before a Grand Jury and has not been granted use immunity or, for that matter, immunity of any kind. There have been a great many decisions along the lines of United States v Handler and the S.E.C. gives no reason for citing this particular one. The fact that the S.E.C. should even cite such an irrevelant case combined with the fact that the S.E.C. has many attorneys working on litigation in general and on Sloan's appeals in particular serves to demonstrate that there is no authority for the position the S.E.C. has taken and that the S.E.C. is proceeding in bad faith.

C

THE CONTEMPT ORDER IS INVALID BECAUSE JUDGE WARD WAS PERSONALLY DISQUALIFIED FROM PROCEEDING IN THIS CASE.

Although the appellant has already cited copeous authority which is sufficient to require the reversal of Judge Ward's decisions, the fact remains that so long that Judge Ward is permitted to sit on Sloan's cases, any victory Sloan might achieve in the Court of Appeals is likely to be temporary. The road which the appellant in this case has taken to the Court of Appeals has been long and frustrating. The appellant has fastideously observed the judicial rule which requires that all legal argu-

ments presented to the Court of Appeals must first be presented to the District Court. This has required the appellant to expend considerable time and energy studying the law, preparing briefs and arguments. At the same time, the appellant has long been aware that Judge Ward has no interest in the facts and the law of this case. Rather, Judge Ward [illegible] to be possessed of a singular desire to prosecute and punish the appellant. The particular facts and the context of the case in which he does it appears to be incidental.

There is nothing in any of the decisions or in any of the [illegible] which have been entered by Judge Ward in the court below in this [illegible] the prior lawsuit which indicates that Judge Ward has read Sloan's [illegible] papers. The two reported decisions of Judge Ward, 369 F. Supp. 991 (1973) and 369 F. Supp. 996 (1974), were copied almost word for word from the briefs filed by the S.E.C. As a result, the Federal Supplement has been graced with two decisions which vastly distort the facts and the evidence involved. Even the S.E.C. is unwilling to defend most of the fact findings made by Judge Ward in that prior action now on appeal in 74-1436.

In the instant lawsuit, Judge Ward usurped jurisdiction over [illegible] which was not properly assigned to him and has continued to sit steadfastly on this case even though the appellant requested that he recuse himself within hours after the complaint was filed. Thus far, Judge Ward has withstood a petition for a writ of mandamus, Sloan v Ward 75-3001, and three recusal motions which were brought with intent to force Judge Ward off this case.

As Mr. Justice Rehnquist noted in dissent in Codispoti v Pennsylvania, supra 418 U.S. at 530: "A judge can be driven out of any case by any counsel sufficiently astute to read the new-found constitutional princi-

ples enunciated in these decisions." The majority of that court did not expressly disagree although it said that this observation "undervalues the import of the due process clause." 418 U.S. at 503 n. 10. It turns out, however, that Mr. Justice Rehnquist was wrong. Most decisions involving recusal have dealt with situations where:

> "experience teaches that that the probability of actual bias on the part of the decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome, and in which he has been the target of personal abuse or criticism from the party before him" (citations omitted) Withrow v Larkin 421 U.S. 35, 47 (1975).

Here, we have a far more serious situation. This is not merely a situation where "the probability of actual bias .... is to high to be constitutionally tolerable." Rather this is a situation where a United States District Judge has ignored the law and has proceeded with intent to injure a litigant. Regardless of what this court decides, the injury which Sloan has suffered at the hands of Judge Ward is irreparable. The S.E.C. has already used Judge Ward's two decisions as the basis to bar Sloan for life from being associated with a broker or dealer. (App. 116) The task involved in perfecting these appeals has carved a year out of the life of the appellant. Even if Judge Ward is reversed and even if the decision and order of the S.E.C. is vacated the harm which Sloan has suffered cannot be compensated.

However, the immediate concern of the appellant is not with the past but with the future. The normal procedure on a remand is that the case is sent back to the judge who decided it previously. If this court approves the procedure by which Judge Ward acquired jurisdiction in this action to begin with, jurisdiction over all future cases brought by the S.E.C. or by anybody else for that matter in which Sloan is named as a defendant can be taken over by Judge Ward.

The rules which the Supreme Court has established regarding the

circumstances under which a judge must disqualify himself do not answer the question of what is to be done in the case of a judge who refuses to comply with these rules. The problem is that when faced with a recusal motion, a judge who is truly biased and who has the desire to injure a litigant will most certainally stay on the case regardless of what the appellate courts have said on the subject, whereas a judge who is truly not biased can be counted upon to recuse himself if a sufficient showing is made. In the case at the bar, the appellant is familiar with the law of recusal and has read the decisions which, according to Mr. Justice Rehnquist, set forth principles which enable any judge to be driven out of a case. The appellant has filed a sufficient affidavit (App. 124-127) and has submitted a carefully researched memorandum which cites the applicable law on this point, and nevertheless Judge Ward has refused to recuse himself. This result, incidently, could have been predicted by anybody who has read the record of the cases involved. Judge Ward has been embroiled in a running controversy with Sloan for two years now and only the most naive person would believe that Judge Ward would obey the law and recuse himself from this case.

Even if the appellant were legally wrong or if Judge Ward's actions were arguably correct, his conduct thus far has created such an appearance of impropriety that the Court of Appeals must not hesitate to remove him from this case. The office of United States District Judge is probably the most powerful of any in the federal government save the office of President. Appellate review of district court decisions is often an act of futility. A prisoner may be in jail for years waiting for the appellate process to be completed or he may have served his sentence before the Court of Appeals has had time to make its decision. In one notorious case, Rosenberg v United States, supra, the Supreme Court handed down its decision three weeks after the defendants had been executed.

In the instant case, the appellant did have available any of the

safeguards which normally protect a litigant from a corrupt and biased judge. There was no trial by jury. Indeed, there was not even a hearing. Nor was the defendant protected by the lottery system which is in use in the Southern District of New York as well as in the Court of Appeals which would otherwise have created only a 3.3% likelyhood that this case would be assigned to Judge Ward. The lottery by which the assignment of cases is decided is conducted in public on the sixth floor of the U.S. Courthouse. This practice was instituted to alleviate the suspicions of many lawyers that the syster by which judges were selected was somehow rigged. There can be no doubt that the preservation of the lottery system is essential to insure continued confidence in the administration of the courts.

The conduct of Judge Ward can be compared with that of the judge in In re Murchison 349 U.S. 133 (1955). There the judge set himself up as a one man Grand Jury and personally tried and convicted the defendant. The Supreme Court reversed and in subsequent cases based on the authority of that decision established a rule whereby a judge who has been the subject of a personal attack must disqualify himself from any contempt proceeding. See Marberry v Pennsylvania 400 U.S. 455, 465-466 (1971); Taylor v Hayes, supra 418 U.S. at 501-503. The appropriateness of the application of that rule to the instant case is re-enforced by the fact that the personal attacks which the appellant has made on Judge Ward (Arg. 125) have obvious merit. Even the S.E.C. has expressed no disagreement with Sloan's description of Judge Ward's courtroom antics. Clearly, under these circumstances, Judge Ward should have recused himself from this case and, in view of his unwillingness to do so, this court should do it for him.

POINT II

THE DISTRICT COURT ERRED IN FAILING TO ENJOIN THE SECURITIES AND EXCHANGE COMMISSION FROM HARASSMENT AND ANNOYANCE.

During the course of its nearly five years of litigation against and investigation of Sloan, the S.E.C. has adopted a tactic which has had the effect of totally disrupting Sloan's life to the point that he has not been able to enjoy serene existance to which most Americans feel they are entitled as a matter of right. Specifically, the S.E.C. has adopted the practice of picking up the telephone whenever it feels the occasion to do so and calling any person who happens to be associated with Sloan ostensibly to gain information necessary to its investigation of Sloan. The S.E.C. has placed random telephone calls to Sloan's mother, lawyer, friends, enemies, business associates, present and former employees and employers as well as any other person who might have information about Sloan and has asked them all manner and variety of questions about Sloan in what appears to be an insatiable quest for information about Sloan's activities. The S.E.C. has not denied that it has followed this practice and indeed information supposedly gleaned from these telephone calls form the basis of much of the S.E.C.'s cases against Sloan.

The telephone call which finally provoked Sloan to move to enjoin the S.E.C. from harassment came on February 24, 1975. (App. 2). On this decision, Pernick, the S.E.C. employee who made the call, did not identify himself nor did he state the reason for his call. Instead, he inquired as to the name of the person who had answered the telephone and asked various questions concerning Sloan's activities. Only after his questions had been answered did he identify himself. (App. 2).

This is a familiar tactic which has been adopted by the S.E.C. on many occasions. (App. 3). This conduct, particularly in view of the surrounding circumstances (App. 2-4) should be enjoined. Significantly, the S.E.C. does not dispute the facts alleged in Sloan's affidavit. (App. 6). Instead, it asserts merely that "the Commission's staff have at all times conducted themselves properly." (App. 6).

The conduct of the S.E.C. investigators is reprehensible and should be enjoined. Sloan has been available to answer all questions about himself. Any information the S.E.C. could get from anybody else would be hearsay.

If a client or some other person has a complaint against Sloan, and so far no such person has appeared, the S.E.C. has a published number in the telephone book which the public is free to call. In addition, the practice by which an S.E.C. attorney makes a telephone call and asks questions without identifying himself or the agency where he works is sufficiently reprehensible as to require disciplinary proceedings. In United States v Powell, supra the Supreme Court observed that Congress has expressed concern for this type of problem and has passed legislation to prohibit overly zealous and vexatious tactics by government investigators. In short, the district court should be reversed and the S.E.C. should be enjoined from harassment and annoyance.

It is also worthy of mention that the way the S.E.C. most frequently learns the names of Sloan's friends, business associates, etc. is to go through his checkbook. By pursuing this investigative technique, the S.E.C. is able to learn virtually every association which Sloan has. See California Bankers Assn. v Schultz 416 U.S. 21, 85 (1974) (Douglas, J., dissenting). This should explain in part the position Sloan has taken which led to this appeal.

POINT III

THIS ACTION SHOULD HAVE BEEN DISMISSED ON THE GROUNDS OF MOOTNESS.

This action was brought ostensibly to enjoin Sloan from violating S.E.C. Rules 15c2-11 and 17a-4. On April 28, 1975, the S.E.C. revoked Sloan's broker dealer registration and barred him from"being associated with any broker or dealer." Since Rules 15c2-11 and 17a-4 only apply to

brokers and dealers, these rules no longer govern Sloan and Sloan cannot violate these rules even if he feels the desire to do so. Thus this action must be dismissed as moot because there is no "immediacy and reality" to the claim that Sloan might violate these rules. See Golden v Zwicker 394 U.S. 103, 109 (1969); see also De Funis v Odegaard 416 U.S. 312, 316 (1974); S.E.C. v Medical Committee for Human Rights 404 U.S. 403 (1972).

The argument advanced by the S.E.C. in the court below was essentially that the S.E.C. might change its mind at some point in the future or that the Court of Appeals might grant Sloan's petition for review and reverse the S.E.C. on this point, the S.E.C. cited Manly v S.E.C. 415 F. 2d 589, 598 (2d Cir. 1969).[13] In short, the S.E.C. wants to go ahead with a trial, which might last several days, because at some point in the future the S.E.C. may take an unprecedented about face and permit Sloan to re-enter the securities business.

The argument advanced by the S.E.C. is circular. It omits to state that Sections 15(b)(4)(c) and 15(b)(6) of the Securities Exchange Act of 1934 ("Exchange Act") provide the S.E.C. with the statutory excuse to keep Sloan out of the securities business so long as the injunction remains in effect. Thus if the injunction is vacated and the action dismissed, Sloan presumably will be able to get back in to the securities business whereas if the injunction is allowed to stand Sloan will in all likelyhood be kept out of the securities business. To be sure, the S.E.C. can, after notice and the opportunity for a hearing, keep Sloan out of the securities business by establishing the factual basis for other grounds such as the grounds that Sloan has in the past violated an S.E.C. rule.

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13. Simultaneous with moving to dismiss on the grounds of mootness in this case, Sloan filed an identical motion in 71 Civil 2695, now on appeal under docket no. 74-1436. Due to this circumstance, the record of this appeal may not reflect all of the arguments which were advanced in the court below in connection with these motions.

See Section 15(b)(4)(D) of the Exchange Act, 15 U.S.C. §78o(b)(4)(D). This, however, does not aid the position of the S.E.C. To the contrary, it gives the S.E.C. a remedy and deprives it of any rationale for wanting to require the district court to conduct a lengthy trial.

The same point applies to the argument that the Court of Appeals may vacate the S.E.C.'s administrative order. A dismissal on the grounds of mootness presumably would not deprive the S.E.C. of the right to commence a new suit at some future date. Moreover, if the Court of Appeals were to vacate the S.E.C.'s administrative order, the S.E.C. could presumably institute a new administrative proceeding. An injunctive proceeding such as the action at the bar has but one valid purpose and that is to prohibit immediate threatened illegal conduct. S.E.C. v Management Dynamics Inc. 515 F. 2d 801 (2d Cir. 1975). The fact that the S.E.C. would use the existance of an injunctive proceeding to butress its own administrative proceeding does not justify the use of the courts for this purpose. To the contrary, the transparent character of the S.E.C.'s desire to keep the instant lawsuit going because it formed in part the basis for its administrative decision requires that this action be dismissed. It should be noted that the administrative decision of the S.E.C. places evidentiary reliance on certain of Judge Ward's fact findings. (App. 114 n. 19). This, too, is improper. The sole purpose of fact findings is to aid appellate review. Leighton v One William Street Fund, Inc. 343 F. 2d 565 (2d Cir. 1965). Fact findings have no stare decisis effect and, unlike fact findings in anti-trust cases prosecuted by the United States, do not provide prima facie evidence which may be used in another proceeding. Thus, the S.E.C.'s reliance on Judge Ward's fact findings as a matter of evidentiary fact was improper and the fact that the S.E.C. would use the courts for this purpose requires that this action be dismissed.

POINT IV

THE DISTRICT COURT ERRED IN FAILING TO DISMISS THE COMPLAINT, IN FAILING TO HOLD VARIOUS S.E.C. COMMISSIONERS AND ATTORNEYS IN CONTEMPT OF COURT, IN FAILING TO DISQUALIFY THEM FROM APPEARING AS COUNSEL IN THIS PROCEEDING AND IN FAILING TO BAR THEM FROM THE PRACTICE OF LAW IN THIS COURT.

The principal ground for this motion in the court below was that the S.E.C. had issued a [illegible]cation release on May 6, 1975 (see App. 81) which violated Judge [illegible] order of December 30, 1974 as well as the Code of Professional [illegible] of the American Bar Association. At the outset it should be noted that Sloan's request that counsel for the S.E.C. be disqualified from appearing in this action is not a request for relief which can be considered drastic. Moreover, the denial of this motion is an appealable [illegible]rmaco Inc. v Lee Pharmaceuticals 510 F. 2d 268 (2d Cir. 197[illegible]

The S.E.C. derives its authority to appear in court on its own behalf from S.E.C. v Robert Collier & Co. 76 F. 2d 939 (2d Cir. 1935) reversing 10 F. Supp. 95 (S.D.N.Y. 1935). That decision made an arbitrary determination on a question of statutory construction which could have been decided as well by the flip of a coin. In essence, that case decided that Section 21(e) of the Exchange Act, 15 U.S.C. 78u(e), which states that the S.E.C. "may in its discretion bring an action" also implies that the S.E.C. may prosecute that action. The alternative would be that the S.E.C. could bring the action but it would then become the duty of the U.S. Attorney to prosecute the action. There would be nothing unusual in such a rule. In fact, that was the rule prior to S.E.C. v Robert Collier & Co. In short, the appellant believes that S.E.C. v Robert Collier & Co. should be reversed and that all cases brought by the S.E.C. should be prosecuted by the U.S. Attorney.

Admittedly, the courts are unlikely to abandon a rule which has been stare decisis for forty years. However, it should not hesitate to do so when a case comes along which demonstrates the impropriety of the exist-

ing rule. It is submitted that this is that case.

The reason that the courts, as a matter of judicial administration as well as statutory construction, were reluctant to permit the S.E.C. or any other independent agency to appear in court in its own behalf was the fear that there might be an abuse of prosecutional discretion. Apparently, the S.E.C. succeeded in convincing the Court of Appeals that such an abuse of the prosecutional power would not occur and the decision in S.E.C. v Robert Collier & Co. resulted. That decision was not reviewed by the Supreme Court and it appears that that issue was never raised again until Sloan raised it.[14]

Nowadays, cries that the S.E.C. is abusing its prosecutional powers abound. These cries have become particularly vocal now that the S.E.C. has sued law firms such as White & Case, accountants such as Arthur Anderson & Co. and corporations such as Gulf Oild Corp. This is not to say that major law firms, accounting firms and corporations should be immune from suit. However, the abuses of prosecutional power which are most frequently complained about would become impossible if the U.S. Attorney were required to appear in every lawsuit instituted by the S.E.C. At the same time, if Congress was dissatisfied with a Court of Appeals decision to that effect it could change the situation merely by amending Section 21(e) to read that the S.E.C. "may in its discretion bring and prosecute an action----."

An earlier portion of this brief has dealt with specific instances where S.E.C. attorneys misrepresented evidence and engaged in vexatious litigation tactics in a variety of ways. Although these past events did not form the basis for the motion for disqualification and other relief, they were argued before Judge Ward previously in other contexts and it is submitted that they should be considered in connection with this appeal. It is further submitted that this court should also consider Sloan's

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14. Sloan first raised this issue at the commencement of the trial before Judge Ward in 71 Civil 2695 when he asked Judge Ward to disqualify S.E.C. counsel from appearing in this case. Transcript p. 26.

claim that this lawsuit was brought essentially for harassment purposes since Sloan had already been enjoined from violating Rule 17a-4 and it should consider Sloan's claim that the judicial process has been abused by the S.E.C. in various ways. In addition, it should consider Sloan's claims that the S.E.C. violated Judge Ward's order of December 30, 1974 as well as the Code of Professional Responsibility of the American Bar Association since that contention formed the basis of Sloan's motion.

The essential facts are recited in Sloan's moving affidavit (App. 65-66) and will not be repeated here. The underlying issue concerns the practice by the S.E.C. of issuing a "litigation release" whenever it commences or completes the successful prosecution of a suit. Initially, Judge Ward expressed agreement with Sloan's contention that this practice was prejudicial and unfair and ought not to be allowed. (App. 74-76). However when the S.E.C. violated his order, Judge Ward either changed his mind or decided that he was unwilling to adjudge the S.E.C. in contempt of court. The rationale for his decision denying Sloan's motion is beside the point and merely demonstrates Judge Wards one sided favoritism towards the S.E.C. Although he did use the term "end work product" in explaining his order (App. 76), the basis for his directive that the S.E.C. was not to issue litigation releases or to do anything other than direct the attention of the press to filed papers (App. 77) was based on the Code of Professional Responsibility of the American Bar Association. (App. 74). The governing section of that code would be DR 7-107(G) although EC-33 and EC-13 are of interest.

The S.E.C. cannot be heard to argue that it is not bound by the Code of Professional Responsibility or that a violation of that code is not actionable. As noted previously, the S.E.C. has commenced a lawsuit against White & Case and another law firm Lord, Bissell & Brook. The basis for that suit is that according to the S.E.C. those two law firms violated the Code of Professional Responsibility of the American Bar

Association by failing to notify the S.E.C. of the fact that their client, National Student Marketing Corp., was engaging in a fraud. That case, S.E.C. v National Student Marketing Corp., Civil Action No. 225-72 (D.D.C. filed Feb. 3, 1972) is still in litigation. The S.E.C.'s theory that a law firm is supposed to notify the S.E.C. of a fraud committed by its client is based upon what the S.E.C. perceives to be the requirements of Disciplinary Rule 7-102(B)(1). See Ethical Dilemma! Attorney-Client Privilege vs.the National Student Marketing Doctrine by Stuart Charles Goldberg, Securities Regulation Law Journal, Winter 1974 p. 305. Without commenting on the merits of this theory, it can fairly be said that the S.E.C. is bound by the ABA Code.

The issue which remains to be decided is one of great importance to the administration of justice in the United States Courts. The fact is that the S.E.C. commences a great many civil suits, most of which are terminated by default judgments or decrees entered by "consent." Only a tiny percentage of these cases are ever litigated, the instant case being an example of one of them. Since frequently the consent judgments are entered on the same day the complaint is filed, a question has been raised as to why the S.E.C. files these suits when presumably most of the defendants would be willing to agree to be bound by a stipulation or an undertaking which would not require the invocation of the judicial power. The answer to this question lies in the fact that when the S.E.C. commences suit it issues it customary litigation release which "discloses" to the public the essential facts which caused the S.E.C. to decide to institute suit. The impact of these press releases often far outweighs the incidence of the litigation itself. For example, throughout most of 1975 the newspapers have been filled with stones concerning bribes and illegal political contributions paid by Gulf Oil Corp., Northrop Corp. and others (see e.g. App. 107-109). All of these news items had their origins in litigation releases issued by the S.E.C.

In a speech to the Society of Business Writers on May 6, 1975, R. Garrett, Jr. explained this point. The full text of that speech is included in the appendix to this appeal (App. 86-106) and is recommended reading since it provides insight on the S.E.C.'s thinking concerning a number of matters of interest to this court. Of particular interest is Mr. Garrett's point that injunctive actions instituted by the S.E.C. "inflicting excrutiating pain" (App. 100) upon defendants named in those actions. In addition, according to Mr. Garrett, the bringing of S.E.C. enforcement actions customarily spawns one or more class actions on behalf of shareholders and others who seek "big money damages." (App. 100). Since Mr. Garrett expresses the view that by inflicting excrutiating pain and spawning a multiplicity of litigation the S.E.C. performs a valid governmental function, he indicates that the S.E.C. "wants to inflict more pain" (App. 101) and discusses the appropriateness of legislation which would enable the S.E.C. "to bring its own criminal cases." (App. 102).

It has long been obvious that the S.E.C. brings actions for injunctive relief for the purpose of inflicting punishment. Since the Chairman of the S.E.C. has now justified the S.E.C.'s entire enforcement program on the grounds that it serves the purpose of "inflicting pain," there can no longer be denials on this point. The question for this court to decide is whether the judicial system should continue to be involved in this process.

The S.E.C. is able to inflict pain through the issuance of a litigation release and the inevitable newspaper article which follows. (See e.g. App. 84). This lawsuit demonstrates that were it not for the litigation release, the filing of a complaint by the S.E.C. would not be newsworthy. Here when the complaint was filed the S.E.C. obeyed the command of Judge Ward and no newspaper articles appeared. On April 28,

1975 the S.E.C. revoked Sloan's broker dealer registration and issued an Exchange Act release (App. 110) and still nothing appeared in the financial press. Finally, on May 6, 1975 the S.E.C. issued a press release (App. 81) and an article appeared in the Wall Street Journal the next day. (App. 84).

The appellant has requested that this action be dismissed and that the S.E.C. commissioners and their attorneys be adjudged in contempt of court, disqualified from appearing as counsel in this case, and barred from the practice of law in this court. Although the relief requested is admittedly drastic it is fully justified in the circumstances present here. As the Supreme Court stated in Sheppard v Maxwell 384 U.S. 333, 362-363 (1966):

> "Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."

POINT V

THE DISTRICT COURT ERRED IN FAILING TO GRANT THE DEFENDANT A TRIAL OR HEARING BY JURY.

The Supreme Court in Curtis v Loether 415 U.S. 189 (1974) and Pernell v Southall Realty 415 U.S. 363 (1974) has made it clear that in actions for equitable relief such as this one, the facts are to be tried by jury. With certain exceptions, this rule also applies to contempt proceedings, Bloom v Illinois 391 U.S. 194 (1968). The appellant requested this relief (App. 120). By denying Sloan a hearing of any kind, Judge Ward denied the right to a jury trial also. In sum, Judge Ward should be reversed.

POINT VI

THE DISTRICT COURT ERRED IN DIRECTING THAT CERTAIN QUESTIONS PROPOUNDED IN DEFENDANTS INTERROGATORIES NEED NOT BE ANSWERED BY PLAINTIFF.

It is not clear whether this court will consider this question to be

"judicially known." However, the reason that discovery orders are not generally considered appealable is the policy of the courts against piecemeal appeals. Here this Court is faced with an appeal in any event and there seems to be no reason why this discovery question cannot be settled in this appeal. This is particularly true here where an examination of the defendants interrogatories and the answers propounded thereto may be instrumental to this court in deciding whether or not to permit this lawsuit to proceed. It is submitted that the answers filed by the S.E.C. (App. 137-141) demonstrate that the instant lawsuit is without merit. In addition, if Judge Ward's decision with regard to discovery is allowed to stand the defendant will, in effect, be precluded from proffering certain defenses and in this sense Judge Ward's decision is final and therefore appealable.

In the court below the defendant served interrogatories which propounded fourteen questions to the S.E.C. Judge Ward ruled that the S.E.C. need not answer questions 5, 8, 9, 10, 11, 12, 13 and 14 but ordered the S.E.C. to answer questions 1, 2, 3, 4, 6 and 7. It can be observed that the S.E.C. did not answer the questions the court directed it to answer (App. 137-141) and this point is the subject of a subsequent motion which has not yet been decided. Here the appellant contends that the district court was in error and that the S.E.C. should have been required to answer all 14 questions.

Question no. 5 asks the S.E.C. to identify all brokers, if any, who did what the S.E.C. alleges that Sloan did. This question is based on a proffered defense of selective prosecution. If the S.E.C. has singled out Sloan, this fact should be made known to the court and there is no compelling reason for which this question should not be answered. Questions 8 and 9 are asked in the same vein because the defendant believes that the brokers named there have been accused but not prosecuted for doing precisely what Sloan supposedly did. Question no. 10 asks about

trading suspensions. The S.E.C. contends that it need not answer this question because the answer is a "matter of public record" (App. 54) which is the S.E.C.'s way of saying that the answer can be found in the public files of the S.E.C. However, the S.E.C. cites no authority for this objection and indeed there is no reason why this information cannot be tabulated and provided to the court.

The S.E.C. objects to questions 11, 12, and 13 by arguing that they "relate to the private lives of the Commissioners." (App. 54). However, these questions are calculated to do nothing more than establish whether or not the Commissioners themselves are in compliance with Section 4(a) of the Exchange Act, 15 U.S.C. §78d(a). If they are not in compliance, that would seem to bar them from prosecuting this action. Presumably the Commissioners primarily object to question 13 which asks them to disclose their purchases and sales of securities. In view of the sensitive position the S.E.C. commissioners occupy with respect to securities markets, the Commissioners cannot object to a requirement that they disclose the names of the securities they have been buying and selling. Sloan as a litigant who has been sued by the S.E.C. is entitled to an answer to this question. For example, it would be quite a relevation if it turned out that one of the Commissioners had a pecuniary interest in one of the 293 securities which the S.E.C. says are involved in this suit.

As to question 14, the S.E.C. makes a claim of work product privilege. (App. 55). However, this claim is premature since the question only asks the S.E.C. to identify the documents, not to produce them. The work product doctrine does not apply to the existance or location of information, but only the contents of that information. Butler v United States 226 F. Supp. 241 (D.C. Mo. 1964); McCall v Overseas Tankship Corp. 16 F.R.D. 467 (D.C. N.Y. 1954); Smith v Insurance Co. of North

America 30 F.R.D. 531 (D.C. Tenn. 1962); Harvey v Eimco Corp. 28 F.R.D. 380 (D.C. Pa. 1961). It should also be said that question 14 is a standard interrogatory, routinely asked and answered and the S.E.C. has no special privilege because it is a government agency. See Burke v United States 32 F.R.D. 213 (S.D.N.Y. 1962).

CONCLUSION

For all of the reasons set forth above the decisions of the district court should be reversed.

DATED: December 5, 1973

Respectfully submitted,

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SLOAN 75-7056

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 29 day of Dec. 197 5 deponent served the within Brief upon:

Securities and Exhcnage Commission

attorney(s) for

Appellee

in this action, at

Dept. of Justice, Washington, D.C. and 26 Federal Plaza, NYC

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 29
day of Dec. 197 5.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976